

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 25

ELMER W. HENDERSON, APPELLANT,

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION AND SOUTHERN RAIL-  
WAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

FILED FEBRUARY 11, 1948

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 570

ELMER W. HENDERSON, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION AND SOUTHERN RAIL-  
WAY COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

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**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MARYLAND**

Civil Action No. 3829

ELMER W. HENDERSON, 2560 McCulloh Street, Baltimore,  
Maryland, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION, Washington, D. C. and  
The United States of America, Defendants

COMPLAINT TO ENJOIN, SUSPEND AND SET ASIDE ORDER OF  
INTERSTATE COMMERCE COMMISSION—Filed December 11,  
1947

1. Jurisdiction of the Court is in Title 28, U. S. Code, Sec. 41, paragraph 28 and Sections 43-48; Title 49, U. S. Code, Sec. 17, paragraph 9.

2. This suit is brought by the Plaintiff, a citizen of the United States and a resident of the State of Maryland, against the United States of America and the Interstate Commerce Commission to enjoin, suspend, set aside and annul an order of the Commission dated September 5, 1947, dismissing the plaintiff's petition for an order requiring the Southern Railway System to cease and desist its violations of Title 49, U. S. Code, Sections 1 (4), 3, and 4 (1); as a result of which the plaintiff was subjected to undue and unreasonable disadvantage and prejudice and was denied full and equal benefit and protection of the laws of the United States and was deprived of his rights, privileges and immunities as a citizen of the United States traveling in interstate commerce.

3. On May 17, 1942, the plaintiff, a Negro, a first-class passenger on a train of the Southern Railway System, a common carrier subject to the provisions of the Interstate Commerce Act, traveling from Washington, D. C. to Atlanta, Georgia, was refused service at the two tables reserved for Negro passengers, said tables being then occupied by white passengers although some seats were vacant. Having failed to be notified by the Steward when he could be served, as promised, he returned to the diner and de-



[fol. 5] manded to be seated and served at a vacant seat available. He was refused service again and was offered to be served at his Pullman seat or later in the dining car when there was a vacant seat at the reserved tables at a time when no white passengers were seated there. At all times when the plaintiff demanded service there were vacant seats in all parts of the car. The refusal of the railroad to seat and serve the plaintiff was based upon an alleged regulation of the carrier, unpublished and unknown to the plaintiff, which required that Negro passengers be served only at the two reserved tables and only when said tables were not occupied by white passengers. The diner was taken off in Greensboro, N. C. and the plaintiff was never served. As a result thereof the plaintiff was greatly embarrassed and humiliated, was forced to forego his meal, was denied the facilities and advantages provided by the railroad for other passengers and was compelled to hire counsel to seek the enforcement of his rights.

4. On May 13, 1944, Division 2 of the Interstate Commerce Commission found that the carrier's act was discriminatory but dismissed the complaint and on September 18, 1944 the Commission dismissed the plaintiff's petition for further hearing.

5. This Court by its decree dated February 18, 1946 set aside the said order and remanded the case to the Commission for further proceedings in conformity with its decision.

6. On October 5, 1946 further hearing was had before a Commission examiner whose proposed report exceptions were filed on May 5, 1947. The case was argued before the full Commission which on September 5, 1947 issued its report finding that the plaintiff was subjected to undue and unreasonable prejudice and disadvantage and that the dining car regulations of the Southern Railway were not violative of the Interstate Commerce Act. By its order of the same date the Complaint was dismissed. A copy of said report and order are appended hereto as plaintiff's Exhibits A and B and made a part hereof.

7. Plaintiff alleges that the railroad violated Section 1 (4) of the Act in that it failed to provide reasonable facilities [fol. 6] ties and to make reasonable rules and regulations with respect to the operation of through routes.

8. Plaintiff alleges that the railroad violated Section 3(1) of the Act in that it practised undue and unreasonable preference and disadvantage against the plaintiff and subjected him to undue and unreasonable prejudice and disadvantage by the discriminatory, unlawful, and humiliating use of a curtain around tables allegedly reserved for colored passengers, and by giving unlawful, discriminatory, and unnecessary preference and advantage to certain white passengers, in respect to transportation and facilities in that it seated and served them at any vacant seat in the diner but refused such service to the plaintiff solely on account of his color.

9. Plaintiff further avers that the railroad's enforcement of its alleged regulation and that any regulation requiring separation of passengers according to race or color is unreasonable, unlawful and violative of his constitutional rights as a passenger traveling in interstate commerce; and that the railroad has no authority to issue or enforce any such regulation nor is it within the power of the Interstate Commerce Commission so to approve.

10. Plaintiff avers that the order of the Commission of September 5, 1947 is without rational basis, was issued in error, and if allowed to become effective will result in irreparable harm to the plaintiff and deprive him of his liberty without due process of law, all in violation of his constitutional rights.

Wherefore, the plaintiff prays:

1. That the Court find that the refusal of the Interstate Commerce Commission to issue an order to the Southern Railway System to cease and desist the violations aforesaid is erroneous and is in contravention of the rights of the plaintiff.

2. That this Court issue herein a preliminary injunction suspending or restraining the enforcement of, and setting aside the order of the Interstate Commerce Commission, dated September 5, 1947, dismissing the plaintiff's petition.

[fol. 7] 3. That upon final hearing of this cause, a final decree be entered setting aside the order entered in Docket #28895 of the Interstate Commerce Commission.

4. That the plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper.

Lawson, McKenzie & Windsor, 2001 11th St., N. W.,  
— 1, Attorneys for Plaintiff, by B. V. Lawson, Jr.,  
Josiah H. Henry, Jr., 22 St. Paul Street, Baltimore,  
Md.

*Duly sworn to by Belford V. Lawson, Jr. Jurat omitted  
in printing.*

**Certificate of Service**

Copies of the above Complaint and Attached Exhibits  
A and B served by registered mail on the U. S. Attorney  
General, Department of Justice, Washington, D. C. and  
Interstate Commerce Commission, Washington 25, D. C. the  
18 day of November, 1947.

B. V. Lawson, Jr.

Service of a copy of the above Complaint and attached  
Exhibits A and B acknowledged this — day of —, 1947.

—, United States Attorney for the District  
of Maryland.

[fol. 8]

EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

No. 28895

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

Submitted July 1, 1947. Decided September 5, 1947

Upon further hearing, prior report 258 I. C. C. 413, defend-  
ant's present regulations, requiring separate accommo-  
dations for white and Negro patrons of its dining cars,  
found not in violation of the Interstate Commerce Act.  
Complaint dismissed.

Belford V. Lawson, Jr., for complainant.

Charles Clark and A. J. Dixon for defendant.

## Report of the Commission on Further Hearing

By the Commission:

The complainant filed exceptions to the report proposed by the examiner, and the issues were argued orally. Exceptions and requested findings not specifically discussed in this report have been given consideration and found not justified.

In the prior report, 258 I. C. C. 413, division 2 found that the failure of the defendant on May 17, 1942, to furnish dinner service in its dining car to the complainant, a member of the Negro race, while he was traveling as a first-class passenger from Washington, D. C., to Atlanta, Ga., subjected complainant to undue and unreasonable prejudice and disadvantage; that no basis for an award of reparation for damages had been shown; that the record did not disclose that the general practice of the defendant, as evidenced by supplementary instructions to its employees issued August 6, 1942, would result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service; and that the entry of an order for the future would serve no useful purpose. The complaint was dismissed.

Thereafter the complainant brought suit in the United States District Court for the District of Maryland seeking the following relief, as stated by the court:

The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining-car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining-car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining-car tables provided for Negro passengers.

[fol. 9] The statutory three-judge court held, in *Henderson v. United States*, 63 F. Supp. 906, that defendant's dining-car regulations in force when the prior report was adopted did not provide the equality of treatment required by section 3(1) of the Interstate Commerce Act, and were not, as the division found, adequate for the future. By decree



entered February 15, 1946, the court set aside the division's order of dismissal and remanded the case to us for further proceedings in the light of the principles announced in its opinion. We thereupon reopened the proceeding for further hearing, at which only the defendant presented additional evidence. The facts stated in the prior report are not disputed, and will not be restated in full.

Other holdings of the court which directly affect our disposition of the issues now before us may be summarized, as follows: That racial segregation of interstate passengers is not per se forbidden by the Constitution or by any act of Congress; that the failure of the Congress to exercise its power under the commerce clause of the Constitution to legislate with respect to race segregation in interstate travel is equivalent to a declaration that interstate carriers may separate white and Negro passengers, but that they must afford substantial equality of treatment to members of both races traveling under like conditions; that the prohibition of section 3(1) of the act, against subjecting any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, embraces the matter of dining-car facilities, as well as seating, sleeping, or other facilities of interstate carriers; that the division correctly found the complainant had been subjected to undue and unreasonable prejudice and disadvantage; that complainant's right to future relief does not depend upon whether he intends to make a similar journey in the future; that the division erred in finding that defendant's general practice, evidenced by its instructions to employees as supplemented August 6, 1942, would not result in substantial inequality of treatment as between Negro and other passengers seeking dining-car service; that when railroad regulations permit the seating of white passengers at tables reserved for Negroes, equality of treatment requires that Negro passengers be seated at any available seats in the dining car when the space reserved for them is occupied; that the alternative afforded Negro passengers of being served in their coach or Pullman space without extra charge therefor, does not constitute an offer of service substantially equivalent to that furnished in a dining car; and that an arrangement whereby tables are set aside for the exclusive use of white passengers, while none is reserved exclusively for Negroes, does not afford substantially equal treatment.

Concerning the application of State segregation laws to interstate passengers, the court concluded that—

it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the railway company does not rely upon them.

After *Henderson v. United States*, *supra*, was decided on December 17, 1945, the defendant issued the following new instructions, now being observed by its dining-car employees:

[fol. 10] TRANSPORTATION DEPARTMENT CIRCULAR NO.  
142. CANCELLING INSTRUCTIONS ON THIS SUBJECT  
DATED JULY 3, 1941, AND AUGUST 6, 1942

Subject: Segregation of White and Colored Passengers  
in Dining Cars.

To Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all

times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

R. K. McClain, Assistant Vice-President.

The curtains separating the tables reserved for Negroes from the rest of the tables, and the conditions which prompted their installation, are described in the prior report. At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wooden partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry, and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendant's intention to make similar structural changes in all of them.

The current regulations were designed by the defendant to meet the court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be [fol. 11] seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no circumstances are white passengers served in such space; nor are colored passengers served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining

cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 percent, were served to Negro civilians and 706, or 1.88 percent, to Negroes in the military services. Of the 20,789 meals served during the first 10 days of October 1946, 723, or 3.48 percent of the total, were served to Negro civilians and 149, or 0.72 percent, to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 percent of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 percent of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the inclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space.

With respect to the contention of complainant that the use by defendant of curtains or partitions, as described, violates the rule of substantially equal treatment, and results in undue preference and prejudice, in that Negroes are subjected to humiliation and embarrassment not experienced by white passengers, the statutory court stated that the method of carrying into effect the principle of segregation approved by the Supreme Court is for us to determine. In *Mays v. Southern Ry. Co.*, 268 F. C. C. 352, decided April 8, 1947, after concluding that the evidence did not justify a finding that equality of treatment can result only from the discontinuance of segregation in dining cars, we found that the dining-car regulations under consideration herein were not shown to be in violation of section 3 or of any other provision of the act we administer. The record in the instant proceeding does not warrant a different conclusion; no



it afford sufficient justification for condemning the methods by which defendant separates the tables reserved for white and colored patrons.

[fol. 12] In support of his position that defendant's current regulations constitute an undue burden on interstate commerce, the complainant relies upon the recent decisions of the Supreme Court in *Morgan v. Virginia*, 328 U. S. 373, and of the United States Court of Appeals for the District of Columbia in *Matthews v. Southern Ry. System*, 157 Fed. (2d) 609, wherein statutes of the State of Virginia requiring the separation of white and colored passengers on interstate motorbuses and railroad coaches were held unconstitutional and invalid. The cited cases are readily distinguishable from the instant proceeding. They involve the power of a State to regulate interstate commerce, whereas the issue here concerns regulations of an interstate carrier. As stated previously herein, the statutory court in *Henderson v. United States*, *supra*, pointed out that it was not necessary to approach the case from the aspect of State segregation laws, and concluded that the inaction of Congress respecting segregation means that interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded both races when traveling under like conditions. Defendant's dining-car regulations apply only to service in dining cars, which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemned as imposing an undue burden on interstate commerce. We think it evident that the cases to which the complainant refers are not determinative of the issues herein.

Upon further hearing, we affirm the prior findings that complainant was subjected to undue and unreasonable prejudice and disadvantage, and that no basis for an award of reparation for damages has been shown. We further find that the dining-car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of section 3, or of any other provision of the act. An order for the future is not necessary. The Complaint will be dismissed.

AITCHISON, *Chairman*, dissenting in part:

For the reasons stated in my dissenting-in-part expression in *Mays v. Southern Railway Co.*, 268 I. C. C. 352, decided April 8, 1947, wherein we considered the identical dining-car regulations that are considered herein, I dissent from the finding that these regulations, now currently in force, are not shown to be in violation of section 3, or of any other provision of the act.

In addition, the current regulations leave entirely to the discretion of the individual passenger conductors and dining car stewards the determination of whether passengers are "white" or "colored." Discriminations and prejudices will be the inevitable result of the uncertain guide afforded by the quoted words.

I am authorized to say that Commissioner Mahaffie concurs in this expression.

Commissioner Mitchell did not participate in the disposition of this proceeding.

[fol. 13]

EXHIBIT "B" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of September, A. D. 1947,

No. 28895

ELMER W. HENDERSON

SOUTHERN RAILWAY COMPANY

*It appearing.* That on May 13, 1944, division 2, made and filed its report and entered its order in the above-entitled proceeding, and that on September 13, 1946, this proceeding was reopened for further hearing:

*It further appearing.* That the proceeding has been further heard, and that the Commission, on the date hereof, has made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said

report and the aforesaid report of May 13, 1944, are hereby referred to and made parts hereof:

*It is ordered,* That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 14] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed December 24, 1947

Now comes the United States of America, defendant in the above case, and for its answer to the complaint filed herein answers and says:

1. Answering paragraph 1 of the complaint, defendant admits that this Court has jurisdiction of the cause and of the parties thereto.

2. Answering paragraphs 2 through 6, inclusive, of the complaint, defendant admits and alleges that the Interstate Commerce Commission in the due course of administrative procedure, including full and fair hearings at which plaintiff had the opportunity to submit evidence and argument, duly made its report and order of September 5, 1947, appended to the complaint as Exhibits A and B.

3. Answering paragraphs 7 through 10, inclusive, defendant denies the allegations thereof and alleges that the Commission's said order of September 5, 1947, was duly made upon substantial evidence and in accordance with applicable law and was and is in all respects valid and lawful.

4. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

[fol. 15] Wherefore, defendant prays that the relief prayed for by plaintiff be denied and that the complaint be dismissed.

Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Bernard J. Flynn, United States Attorney.

John F. Sonnett, Assistant Attorney General. Bernard J. Flynn, United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons:

B. V. Lawson, Jr., Esq., 2001 Eleventh Street N. W., Washington, D. C.

Josiah F. Henry, Jr., Esq., 22 St. Paul Street, Baltimore, 2, Maryland.

Allen Crenshaw, Esq., Interstate Commerce Commission, Washington 25, D. C.

This — day of December 1947.

Edward Dumbauld, Special Assistant to the Attorney General. Bernard J. Flynn, United States Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed  
February 5, 1948

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereunto or unto



so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

## I

Answering the allegations of paragraphs I and II of the complaint, the Commission admits jurisdiction of the Court of the action herein and venue of the parties thereto.

## II

Answering the remaining allegations of the complaint herein, the Commission alleges that proceedings involved in this action were instituted upon the filing of a complaint by the plaintiff herein with the Commission on October 10, 1942, seeking an order against the defendant, the South-[fol. 17] ern Railway Company, requiring said defendant to cease and desist alleged violations of the Interstate Commerce Act, alleged to have been committed by said defendant, in respect to equal and just dining car facilities for Negro interstate passengers, alleged to have been incurred or sustained by the said complaint; that thereafter said complaint was made the subject of hearing held at Washington, D. C., February 24, 1943, under Docket No. 28895, at which hearing evidence was submitted by the parties in interest, including plaintiff herein, following which the examiner submitted his recommended report dated May 28, 1943, to which exceptions were filed by said complainant, plaintiff herein; that thereafter Division 2 of the Commission entered its report and order of May 14, 1944, wherein it was decided that the complainant, plaintiff herein, had been subjected to undue and unreasonable prejudice and disadvantage as a result of a casual incident, and because of bad judgment on the part of an employee on the defendant railroad, and over-crowding of trains due to war conditions, and not because of general practices or rules of defendant, which were held adequate to avoid in the future any inequality of treatment as between Negroes and other passengers seeking dining-car service, for which no order for the future would serve a useful purpose; and that complainant had not sustained any damage in consequence of the violation of Part I of the Interstate Commerce Act, on the basis of which an award of reparation could be made and for such reasons dismissed the complaint; and that complainant filed a petition for reconsideration

and further hearing on July 12, 1944, which was denied by the Commission at a general session, by order entered September 18, 1944; that thereafter plaintiff instituted action in this Court, which was decided by the statutory court on December 17, 1945, with opinion and decree 63 [fol. 18] F. Supp. 906, setting aside and enjoining the said Commission order of Septemebr 18, 1944, for reasons therein stated; that thereafter the Commission reopened said proceedings, held further hearings, received the recommended report and order of its examiner, to which exceptions were filed by said complainant, heard and considered briefs and oral arguments submitted by counsel for complainant and other parties to the proceedings, and on September 5, 1947, made and entered its report on further hearing and order, Exhibits A and B to complaint herein, wherein it was found that the new rules, regulations, and instructions of the said Southern Railroad, issued after the Court decision of December 17, 1945, now provide full equality of treatment and service as between white and colored passengers in its dining-car service, under provisions in said rules, regulations, and instructions, for the separation or segregation of such white and colored passengers, thereby making it unnecessary and of no purpose to issue an order to said railro. 1 to cease and desist from practices and methods of separation or segregation of such Races, as was found to have constituted and resulted in discrimination against said complainant upon the occasion complained of, viz., May 17, 1942, under the rules, regulations, and instructions then in force and applied, and for such reasons, dismissed said complaint; and that the order of September 5, 1947, is the final order of the said Commission.

### III

The Commission further alleges that the findings and conclusions in said report of September 5, 1947, were entered after a full and fair hearing, were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that, in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention [fol. 19] on behalf of the parties to the said proceedings by their respective counsel.

The Commission further alleges that said report and order, above referred to, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them, that in making said report and order the Commission did not exceed the authority conferred upon it by law, and denies each of and all of the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all of the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in the said report of September 5, 1947, above referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission. By: Allen Crenshaw, Attorney. Bernard J. Flynn, U. S. Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 20-23] *Duly sworn to by J. Haden Alldredge. Jurat omitted in printing.*

[fol. 24] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF INTERVENING DEFENDANT—Filed June 4, 1948

Comes now Southern Railway Company, intervening defendant herein, and, with leave of Court first had and obtained, files this its answer to the complaint herein.

This intervening defendant hereby adopts the answer herein filed on behalf of the Interstate Commerce Commission, a defendant in this cause, in the same manner and to the same extent as though each paragraph thereof were herein fully set out.

Wherefore, having answered, this intervening defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Charles Clark, A. J. Dixon, Attorneys for Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 3829—Civil

ELMER W. HENDERSON

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

**Transcript of Proceedings—June 4, 1948**

Before Judges Morris A. Soper, William C. Coleman, and W. Calvin Chesnut

[fols. 26-27] Baltimore, Maryland, June 4, 1948.

The above-entitled case came on for hearing, before Judges Morris A. Soper, William C. Coleman, and W. Calvin Chesnut, at 10 o'clock a. m.

**APPEARANCES:**

For the Plaintiff: Mr. Josiah H. Henry and Mr. Belford V. Lawson, Jr.

For the Defendants: For the United States of America: Mr. Bernard J. Flynn, Mr. Edward Dumbald, and Mr. William D. McFarlane. For the Interstate Commerce Commission: Mr. Daniel W. Knowlton and Mr. Allen Crenshaw. For the Southern Railway: Mr. Charles Clark and Mr. A. J. Dixon.

[fol. 28]

Proceedings

Judge Soper: Gentlemen, this is the case of Henderson against the Interstate Commerce Commission and the

United States, in which the Southern Railway has been allowed to intervene.

How shall we proceed?

ARGUMENT OF MR. BELFORD V. LAWSON

Mr. Lawson: May it please the Court, we are here for the second time on this case. As the Court may remember, the record is practically the same, although there has been a subsequent hearing before the Commission, in view of the Court's ruling.

We offer the record in the previous case, and the ruling of the Commission, and the record in the subsequent hearing. The testimony, however, is practically identical. So, on the record, I think we can all agree that the record in the former case, coupled with the latest ruling of the Commission, constitutes this record. We are here today to set aside the order of the Commission, dated September 5, 1947.

Judge Soper: Before you go on, is it submitted on the prior record alone or on the prior record together with the record made in this particular case?

Mr. Lawson: Both records.

Judge Soper: Is that agreed?

Mr. Crenshaw: Yes, Your Honor. I think the new record [fol. 29] will include the new rule, the amended rule, of the Railway. That is practically the only difference between us.

Isn't that right?

Mr. Lawson: That is right. And there were certain exhibits of the defendant which go along with the new regulation, and very brief testimony in the new case. We offer that.

Judge Soper: I assume the new rule to which you refer is set out complete in the complaint or in the answer.

Mr. Lawson: Yes, sir.

Mr. Crenshaw: And also set out in the report of the Commission, which is attached.

Mr. Dumbald: I think the case should be tried on the complete record, because if the complete record is not here, then the Opinion of the Commission cannot be challenged, as per the Mississippi Valley case. So I think we are all in agreement that the case ought to be tried on the complete record.



Mr. Lawson: This order of the Commission is dated September 5, 1947, dealing with the regulation regarding dining car facilities and service to negroes. We contend that the new regulation and the ruling and report of the Commission with respect thereto fails in three or four ways. We feel, first, that the Commission erred in failing to find that there was a violation of Section 1(4) of the Act, section 1(4) having to do with reasonableness of the regulation [fol. 30] and Section 3, as to discriminatory and illegal aspects of the regulation.

We feel, further, that this new regulation violates the Fifth Amendment to the Constitution, and that it is against Federal public policy.

I think the defense blows hot and cold with respect to the statute. They make the contention in their brief, as I understand it, that there is no statute involved. We say that there is a statute involved. It was involved in the record before, and it is involved here.

In the last hearing before the Commission, one of the defendants' witnesses testified that the new regulation was based upon the statute. That was borne out by the record, at page 206, from which I read.

Judge Soper: Don't you think it would be helpful if you would tell us again what the new regulation provides?

Mr. Clark: In that case, if counsel has some extra copies of the Interstate Commerce Commission's report, it would be helpful.

Do you have any?

Judge Soper: We have only the one copy; and that is written on both sides.

Mr. Clark: I will be very glad to let the Court have my copy.

Mr. Crenshaw: Usually I have them for the Court, but I thought it was attached to the complaint. The only one I [fol. 31] have is attached to the complaint.

Judge Soper: Aren't the reports of the Commission printed?

Mr. Clark: Yes, sir.

Judge Soper: Wouldn't it be easier to have printed copies of them?

Mr. Crenshaw: That is true. But, in the rush to get here this morning, I overlooked that detail; and I apologize.

Mr. Lawson: I suppose that was partially my responsibility; but I was in the same position. I was not sure we

were going to be heard this morning; and I rushed away, too, for which I, likewise, apologize.

The main difference in the regulation is this, that formerly the old regulation did not make the Jim Crow table absolute. It set up the table, or the small, two-seated table and the large, four-seated table in the corner near the kitchen, but did not make it absolute. So when a number of negroes, over and above the four or five seats provided, suddenly came into the diner, they could not eat. The new regulation makes the table absolute. It ropes it off and sets up a "Reserved" Card on that one four-seated table, so that white people cannot occupy it, whether negroes occupy it or not.

Judge Soper: What becomes of the table across the aisle?

Mr. Lawson: It is discontinued. There, instead of that table, is the Steward's table, the cash register, and all of [fol. 32] the rest. I have some exhibits that I would like to give to the Court at this time.

Mr. Dumbald: Was that in the record before the Commission?

Mr. Lawson: Oh, yes; it was in the record before the Commission; and I think they are in the record now. I think it would be very helpful at this point if those were offered in the record.

Our contention is that the new regulations are worse than the former regulations. The regulation is more discriminatory. It does not conform to the ruling of this Court. This Court held previously in this case that equality of treatment of the colored passenger subsequently applying for service, required that, if he could not be seated at the Jim Crow table, he be seated somewhere in the car. This Court held that if these two Jim Crow tables were occupied by white people, or were partially occupied by white people, and the seventh negrow came in and could not sit at one of the tables, he must be provided for some place in the body of the car. We claim that this regulation does not conform, first, because it is limited; we have but four seats.

Judge Soper: You had six before?

Mr. Lawson: Yes, sir. When the fifth person comes in now, the testimony before the Commission was that he would have to wait and could not, under any circumstances, eat.

[fol. 33] We feel, further, that this regulation, even though it provides for the absoluteness of one table, puts us right

up under the noise and confusion attendant to the Steward's operations, with the waiters making change, and that it is not, in any sense, equality of treatment. This table is set up against the kitchen-end of the car, which, admittedly, is not as comfortable. White people do not have to sit at that one table. They have a choice. They can sit anywhere; but negroes do not. They must sit there.

We feel, further, that it is hotter. Formerly, there was a curtain. We claim that it does not conform to the Virginia statute. It is set off by a partition which stops the free flow and circulation of air. It is not as comfortable, in any sense, as the old curtain or the two tables. It obstructs the view, and it makes it worse, because the curtain did completely hide the negro passengers. When you sit at that table, you can see the tops of the heads of the other passengers. It is much more humiliating than the condition under the old regulation, when we were shunted off and closed up. Now we are partially exposed, and it makes the other passengers in the car wonder what is behind this wooden partition.

Further, as we stated in our brief, and as the testimony will show, the Vice-President of the Southern Railway testified that these partitions were made for the convenience [fol. 34] of the company,—not the convenience of the passengers, as the Interstate Commerce Act requires. We think it is more expensive; and, in the long run, the public has to pay for these partitions.

Judge Soper: Why was there a partition for the convenience of the company?

Mr. Lawson: It is put at the kitchen-end of the diner where the Steward is, where the waiters come and make change, and where there would be less trouble for the company to operate there. They have disregarded completely the comfort and convenience of the passengers.

Secondly, it tends to make what we contend is wholly unequal and is a discriminatory process. If they put the Jim Crow table in the middle of the car or at the other end of the car, it would be much more desirable, in view of the heat, the noise and the confusion, and they could not apply the discriminatory practices with the ease that they can now.

More specifically, when a negro comes into the diner,—and I speak from personal experience,—he comes right by the kitchen door, and they put him in the corner, and he sits there until the white passengers are fed. He is obscured

and out of the way, and he sits there until the white passengers have been attended to.

Judge Soper: Why is that? Is there any evidence that [fol. 35] he is not served as promptly as any other passenger?

Mr. Lawson: I do not believe there is any direct testimony in the record. I do not recall any direct testimony; but I know, as a practical matter, that the condition exists.

Judge Soper: Is there a partition also on the Steward's side of the car?

Mr. Lawson: A partial partition. There is a partition which comes right up to the right of his "Cashier drawer"; but it does not go up as high as the partition at the table. I think the exhibits will indicate what I mean. There is a partition in the back of the Steward's cash drawer.

Judge Soper: On this picture (indicating), there is a partition on both sides of the car, and quite high.

Mr. Lawson: As I recall, the side partition—

Judge Soper: This is No. 4. There is a partition on both sides of the car.

Mr. Lawson: I think that picture was taken before the cash drawer was set in,—if your Honor will look at the other picture.

Judge Soper: We will come to the bunch. These are tables in the white section of the car (indicating). And here (indicating) is the desk, or whatever it is, that the Steward has always had in the end of the car. And here (indicating) [fol. 36] is the table where the colored people sit.

Mr. Lawson: That (indicating) is the same on both sides of the aisle. But you see this partition (indicating) is much lower.

Judge Soper: There is nothing on the other side corresponding to that (indicating)?

Mr. Lawson: No, sir.

Judge Soper: I understand your point that this does make for some confusion by crowding at this point; but I do not see what your point is with reference to these lower partitions.

Mr. Lawson: I make no particular point with respect to the lower ones. I make the point with respect to the higher partitions. It is more noticeable. It does not create the sort of curiosity when passengers, under the former regulation, could not be seen at all, except from the side.



We concede that the carriers have the right to make reasonable regulations. But, as we understand the Act, those regulations must be not only reasonable but must be efficient and necessary, and must be designed for the convenience of the passengers, and not for the convenience of only the carrier.

On page 7 of our brief we set forth our argument. The testimony in the case shows that Mr. McClain, Vice-president of the Southern Railway, testified that the carrier undertook to regulate the conduct in the southern states, and that they undertake to maintain peace and good order, and that that was the reason for their regulation.

We say that it is without the pervue of the carrier; that that is a matter for the legislature and for the courts. It is not, therefore, efficient, and necessary. We claim that there is no reason for the regulation.

One witness testified that if negroes were not discriminated against, probably there would be a race riot; that the white passengers would not like it.

Another witness for the railroad, a waiter who had been in the employ of the Southern Railway for 28 years, whose name is John White, had this to say,—and I am reading from the record: "that he had been employed for 28 years; that he had often served white and colored passengers who sat at the segregated table at the same time; and that the Steward did not draw the curtain; that quite often white people sat down with colored people; that he had seen colored passengers sit at the table while a white person was sitting there, but nothing had happened, and there was no objection. That is in the record at pages 96 to 99.

So I make the point that the contention of the railway that they must preserve peace and good order, and that white passengers would not like it, is simply not true, and [fol. 38] by their own testimony.

We claim, further, that it is not, as they claim, a matter of the regulation based upon usage and custom. I understand, of course, that it has been a long-time custom to separate the races. But mere usage and custom are not sufficient, and they are not applicable to interstate passengers. The customs are changing; and I think the Court ought to take judicial notice that the custom is changing. For instance, in aircraft they can't "Jim Crow" white and colored passengers,—not with the Morgan case and the



Matthews case,—in interstate traffic. Even in interstate railway and bus traffic the custom is not as it was formerly. The tendency is in the other direction.

So I submit that these regulations which allocate less space, which keep negro passengers up and under the noise and confusion and heat of the kitchen, and based, as they are, solely on race or color, are no regulations at all.

As I understand the purpose of Section 3 of the Act, it is to secure equality of treatment to all, and to prevent any sort of unjust discrimination. And it includes every form of unjust discrimination. The definitions which I have indicated,—and I think the law will bear me out—mean that they are not concerned only with rail transportation or bus transportation, but with dining car transportation. In other words, we are asking this Court to do what two members of the Commission did, what Chairman Aitchison and [fol. 39] Commissioner Mahaffie did in this case—adopt the view of the Supreme Court as announced in the Morgan case.

We contend that there is a very close analogy. As a matter of fact, we contend that the Supreme Court said that segregation in interstate bus transportation is an invalid burden on interstate commerce, and, in the Matthews case, it said that segregation in interstate rail transportation is an undue burden on interstate commerce. That applies with equal force to our situation here. We see no difference between interstate dining car transportation and interstate bus or interstate rail transportation. Stripped of all distinctions which we lawyers make, it is a matter of simple justice. Of course, distinctions can be made, but, in the final analysis, we say it is discrimination; it is unequal.

We contend further,—and I think this is a new argument—that the right to have equal treatment and equal facilities in a dining car is popular, just as much as any other popular right, and, therefore, it cannot be restricted by the carrier; and then to have the carrier come into court on the restriction of liberty, the freedom of locomotion and freedom of position, which we think are just as important as freedom to think or freedom to speak,—the same sort of popular right. We contend the carriers cannot restrict that. They cannot say to us: "Pay for this meal; but sit

up near the heat of the kitchen. You cannot sit any place." [fol. 40] If your wife comes in with you, if she looks like she is white, you may be separated. If you come in with a white friend, you cannot sit with him. If five negroes come in, one of them must wait, under this new regulation.

We contend that distinctions on the legal technicalities are nothing. It is simply morally a legal requirement. I think it is time that this Court, and that all courts should do what Judge Edgerton did in the *Covenant* case. He had the courage to say that this was a question of public policy, and he laid the foundation for the decision in the Supreme Court in the *Covington* case.

Judge Coleman: Suppose you had two seats; I suppose you would still say that would not meet your contention? Suppose the diner were open for white people at a certain time, and then equally and completely open for negroes at another hour or time?

Mr. Lawson: I think that would be obviously wrong. I think this Court's decision on the former hearing in this case covered the law. Negroes get hungry in the same way and at the same time that white people do. While I do not want to be captious about it, I think, in a democracy, it is a question of freedom of choice and association. It seems to me that that is the heart of this whole question of segregation, and not only here, but the whole system of segregation in the entire nation.

[fol. 41] Judge Chesnut: Your first main point is that there should be no recognition or countenancing of segregation?

Mr. Lawson: In interstate transportation. We feel that federal citizenship is something. It is different from state citizenship. When these interstate passengers go on these trips, they are clothed with federal citizenship; and, like ancient Roman citizenship, it should mean something. And, with federal citizens, these states can't do—

Judge Chesnut: The state is doing nothing here. The Interstate Commerce Commission is a federal agency.

Mr. Lawson: That is two points. I admit that one thing is confusing. They say in one instance that they made this regulation on basis of a state statute. If that is so, it goes out under the *Morgan* case. On the other hand, they say it is just a regulation. We say that the Interstate Commerce

Commission, as an agency of the Federal Government, cannot condone and sanction these burdensome impositions on federal citizens in interstate commerce.

On that point the Supreme Court, in the *Covenant Case*, had something to say. I recognize the distinction; but here is what it said. There are other considerations which would indicate that enforcement of these covenants is judicial sanction contrary to public policy.

"The power of the federal courts to enforce the terms of private agreements is at all times exercised subject [fol. 42] to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."

That is one of the main points in our argument,—that we are restricted in choice and association, and that that is an undue burden which federal citizenship should not have imposed upon it.

So, finally, I ask you to adopt the view of the dissent of the Commission in this case, and to hold that the *Morgan case* and the *Matthews case* control dining car transportation interstate.

#### ARGUMENT OF MR. EDWARD DUMBALD

Mr. Dumbald: If Your Honors please, I am Edward Dumbald, Special Assistant to the Attorney General. I was in Detroit yesterday, but I managed to get a seat on a plane. I am very happy to be in this Court today. I will apologize in advance for the inadequacy of preparation, but I trust that what I do say may be helpful to the Court.

I should say at the outset that I desire to treat the questions here in issue in this case solely upon the basis of existing law. I do not think the case should be decided upon any principles of moral philosophy or political evangelism, or upon these basic doctrines of liberty and free association and the other things which, very eloquently and very properly, my adversary has rested his case on.

From the brief glance that I have had of the plaintiff's [fol. 43] brief here, it seems to me that there is a concession made that actually there is no violation of the Interstate Commerce Act or of God's law, but that the general spirit of the constitution and of American citizenship indicate that there is an inequity of treatment, or separateness

of people who should be joined together in a common federal citizenship which, perhaps from a philosophical or ethical standpoint, is a perfectly reasonable argument.

Judge Soper: Where do you find the concessions that you are talking about?

Mr. Dumbald: I think it is page 16a. It is somewhere in this mimeographed brief. I can find the page later on, if the Court please. But it does say in there that there is no violation of the law but of the spirit of the constitution.

My thought is that, while being a biographer of times just recent—and Judge Wilkins recently made a nice review of my book of the Bar Association Journal,—I should be very sympathetic to this type of doctrine; but I would like to discuss the case, if the Court please, on the basis of existing law, beginning with this Court's prior decision.

As I understand this Court's prior decision, the Court has said that separation per se is not a violation of law, and that, therefore, the question really is whether these new regulations do afford equality of treatment, even though they rest upon the basis of separation. In view of what [fol. 44] this Court has decided, it becomes pertinent to consider whether any subsequent decisions of the Supreme Court have changed the law in any respect. I submit that they have not changed the law. There is the Morgan case and the Covenant cases, which are the cases which have been decided subsequently in the Supreme Court; and, in the other Federal Courts, there are some cases which support the Commission's action here, which are cited in Mr. Clark's very able brief on behalf of the Southern Railway.

Coming to the Supreme Court cases, the Morgan case, as has been conceded by counsel, was based upon the interstate commerce power of the Congress. The theory is that there are certain actions which burden interstate commerce, and that the courts may determine when such a substantial burden exists. There was a dissent, I believe,—Mr. Justice Black and some other Justice taking the view that the commerce power is a power given to Congress to regulate commerce, and that the courts should not undertake to decide what does or does not burden it. But the majority of the Court did follow the customary rule that the Courts may determine what is an undue, direct and substantial burden upon interstate commerce. They decided, on the facts in the Morgan case, that there a substantial burden



did exist. It dealt with a criminal case, as I recall, in which there was a prosecution under a Virginia statute, of a passenger [fol. 45] who would not move from the place where he was sitting, at the direction of the operator of the bus, contrary to a Virginia statute. It was a criminal case, and the Court held that such a statute, when applied to interstate bus passengers and would require them, as Justice Reed said, to move many times in the night, did impose a burden on interstate commerce.

If that principle is applied to the case here, it is obvious that it is entirely inapplicable. This separation would apply not in the night time, and with inconvenience only at meal times. It would not apply to changing seats in the bus. It relates entirely to the dining cars of a railroad; and I see no application of the Morgan case to this case.

Furthermore, this is a case based upon the carrier's own regulation. It is not based upon any state statute or upon any federal statute, or any legal compulsion whatsoever. It is merely a question of applying a voluntary regulation made by the carrier itself.

Judge Coleman: I would like to ask at this point, what is your view with respect to Pullman sleeping car service.

Mr. Dumbald: Well, that is not involved in this case.

Judge Coleman: No; I know it is not. But, by analogy [fol. 46] or relation, what is your feeling about that, from the point of view of segregation?

Mr. Dumbald: The Mitchell case held, as I recall, that there must be equal facilities for the two races. And the practice of the company in that case did not afford such equality. It made it possible for a white passenger, on the very day of travel, to apply for and receive accommodations, whereas the colored passenger could not. The colored passenger had to make application sufficiently in advance, or they would give him a drawing room at the same rate as the ordinary berth. But there were insufficient facilities furnished in that case, as the Commission found.

Judge Coleman: My question relates to whether you would draw a definite distinction between attempts to segregate with respect to meals and attempts to segregate with respect to sleeping car service.

Mr. Dumbald: I think the same principle would apply in both cases. There would have to be, in fact, equal and adequate service for all passengers, or whichever race. I



doubt whether the Morgan case would change the situation any, or the Mitchell case with respect to Pullman transportation. I believe berths would be assigned once and for all, and there would be no changing back and forth permissible, I would say. There must be, under this Court's decision, equal service for all passengers; but it may be a [fol. 47] separate service. That is what I understand the Court's ruling to be, and what I understand the existing law to be. Whether it exposes the passengers to public view, whether they can be seen,—of course, in a drawing-room; I suppose you could not be seen; but in a coach or a Pullman car; I think it is one of the inevitable incidents of travel that people can see you. I don't think there is anything that shows any humiliating inequality when people can see you and see what you look like. So, it is my contention that, under the existing law as laid down in the Mitchell case and in this Court's decision in this case, and in the Morgan case, and, finally, in the Covenant Cases,—And the Covenant Cases really are not applicable here at all, so far as interstate transportation is concerned. They are perhaps illustrative of the great general principles of liberty and citizenship, and policy, and matters of that sort. But the actual decision in the Covenant Cases is that where the state action, to-wit, the act of the courts in enforcing the covenant, is not concerned, the covenants are perfectly valid and legal; and, as long as they are voluntarily carried out; they are not subject to any invalidity. Therefore, applying the principle of the Covenant Cases to this case, it seems to me that as long as it is recognized that we have here a voluntary regulation of the carrier, and is not being imposed by any state agency, and is not being imposed by any Federal agency, it is simply a voluntary regulation with which the Court should not interfere. [fol. 48]

Now, if the Court please, that is my view of the existing law. In the few hours that I had yesterday after finishing the other matter, I have not been able to review these cases. Perhaps the Court would like to hear from my associate, Mr. McFarlane, who, in my absence, was endeavoring to make some preparation on the facts of the case and has set forth the regulations that we had available in the trial.

Judge Soper: Mr. McFarlane?

Mr. McFarlane: If Your Honor please, I do not have anything to say.

ARGUMENT OF MR. ALLEN CRENSHAW

Mr. Crenshaw: May it please the Court, I was before the Court the last time in this case, but I would like to confess that, when we tried the other case, I think both Mr. Clark and I have been somewhat overwhelmed by the tremendous volume of traffic on the railroads, and the usual long line of waiting passengers looking for seats. So we overlooked the discrimination that this Court found; and both of us, as we left the Courtroom, thought we did not discover it.

Judge Soper: You had not discovered what?

Mr. Crenshaw: Had not discovered the discrimination [fol. 49] involved in the prior rule, which this Court pointed out in the course of the argument before.

Judge Soper: What was there mysterious about it that concealed the defect from you?

Mr. Crenshaw: I think it was because of the utter crowded condition it was thought best, under the situation then existing, to say that all tables were always full.

Judge Soper: Of course it would have been very much easier, in your crowded capacity, to just abolish the discrimination; and then there would have been far more room for everybody.

Mr. Crenshaw: You mean to simply say that segregation is abolished?

Judge Soper: Why, surely.

Mr. Crenshaw: Maybe the Commission could say that; but I don't think so. And that is the view of the Commission. The Commission is limited, as you have seen all the way through these cases, to the authority and jurisdiction that is conferred by Congress. And that does not include segregation.

Judge Soper: What doesn't include segregation?

Mr. Crenshaw: The Interstate Commerce Act, under which we receive all of the authority that the Commission has given to it.

[fol. 50] Judge Soper: You mean to say that it does not forbid segregation?

Mr. Crenshaw: It does not forbid it. It does not prohibit it; and, therefore, I say that the Commission has no authority to do either.

Judge Soper: Do you mean to say that the Commission could not abolish this practice, if it wanted to?

Mr. Crenshaw: I do not think so.

Judge Soper: Why not?

Mr. Crenshaw: Because they are not given the authority to do it, unless it involves a discrimination, a preference. If it does that, the Commission has the right to do it.

Judge Soper: There is nothing in the statute which requires them to segregate, is there?

Mr. Crenshaw: Not a thing. We do not segregate them.

Judge Soper: I am asking you whether this statute requires the policy of segregation?

Mr. Crenshaw: No, sir.

Judge Soper: Then, why did you say that you have no authority to abolish the practice?

Mr. Crenshaw: Because we are limited.

Judge Soper: Limited in what?

Mr. Crenshaw: We are limited to what the Interstate Commerce Act says to us. Practically every order of this [fol. 51] Commission that has been overturned by a court—

Judge Soper: Do you mean to say, as Judge Coleman suggests, that you do not put the practice into effect; that the railroads put it into effect?

Mr. Crenshaw: That is right, sir. It is a railroad rule.

Judge Soper: And you have no authority to forbid it unless it is discriminatory?

Mr. Crenshaw: That is right, sir. That is exactly what I mean. I do not see how we could go any further than that. It seems to me that if we undertook to enforce a rule or make a rule as to separation of the races, unless discrimination were involved in it, we would go beyond our authority, and it would be set aside. That is the usual ground upon which the courts set aside commission orders.

Mr. Dumbald was seeking to tell the Court something about this. I regard it as a constitutional question, unless there is a question of discrimination involved. In the printed brief, page 16, at the bottom, here is what is said:

"The plaintiff does not contend that segregation is 'forbidden' *per se* by the Constitution, the Interstate Commerce Act, or any other act of Congress."

Mr. Dumbald: That is the page I was endeavoring to cite to Your Honors.

Mr. Crenshaw: "The plaintiff does not contend that segregation is 'forbidden' *per se* by the Constitution,

[fol. 52] the Interstate Commerce Act, or any other act of Congress, in the sense that there is an outright prohibition."

May I say in passing that the Court, in the last Opinion we had, stated that very thing. That is practically verbatim what this Court said.

"The plaintiff does contend that segregation is a violation of the spirit and purpose of the Constitution."

If it is, then it is something I do not think the Commission has jurisdiction or authority to pass on. It is certainly the wrong tribunal, when it is undertaken to be enforced on the basis of the Interstate Commerce Act. We are limited. If there is such an opportunity to present that view of the case, it would be in a Federal Court or in a State Court, where these other cases are springing up. This is not a matter that the Commission has decided the right or wrong of. The Commission has always based its decisions upon the limitations of its authority to act. Even if all that they contend here were true,—leaving out the question of discrimination and preference,—if I were to admit that as a Member of the Commission, still I would have no authority to enforce my own personal opinion.

Judge Soper: Admit what?

[fol. 53] Mr. Crenshaw: That, under the constitution, segregation is right or wrong,—or under the spirit of the constitution.

The Court has implied something about what one might believe. Maybe it would be interesting for me to say that I grew up on a plantation full of negroes. I doubt if anybody knows them much better than I do. I doubt if any one has more sympathy for them than I have. I spent a lifetime trying to help advance them, and I have spent a life-time trying to fight organizations that are against them; and I can say that I believe I have contributed as much as one ordinary individual could contribute to the advancement of the welfare and giving opportunities to the negroes in this country, particularly those I grew up with and those I have come in contact with. I have always formed my friendships with negroes just like I have with white people. There is as much difference among negroes, one from another, as there is among white people. Some of the finest

people I ever knew in my life, some of the best friends I have had in my life, were negroes. I would not stultify myself by trying to do any deliberate damage to any of them; and, if I had the opportunity, I would call many of them to testify to the fact that I have always been fair and honest with them. I hope I shall never be anything else than that. I am saying that preliminarily to what I am going to say.

[fol. 54] We are here dealing with a railroad rule which prescribes separation. I am sorry they use the word "segregation". And this advice was given the negroes by the man who freed them. He gave them this advice before he died: "You are two different races; and the best way you can live together is to live separately. It is difficult to get along. It is a difficult problem."

As American people, I think we recognize it. It is difficult, not only in the south. And when they accuse the south of being prejudiced on the subject, I do resent it, because I have known others, like Mr. Justice Black, of the Supreme Court, with whom I grew up, who did the same thing that I did. He fought to protect the rights of negroes all of his life. And I did it equally as much.

I have prepared to submit to the Court copies of a short memorandum brief, largely to call attention to the litigated cases that the Courts have ruled upon. I think I have set out all of them.

Judge Soper: You have not furnished them to the Court, have you?

Mr. Crenshaw: No, Your Honor; but I will do so right now, if I may.

There was some mention of the Covenant Cases. I mention those in my brief. I find that, in my hurry to get up the brief, they are given the numbers in the Supreme Court, —decided May 3rd of this year. I have interlined by pencil [fol. 55] the names of those cases.

Those were Covenant cases, in which the covenants required segregation. One came up from California, one from Washington, one from Michigan, and there were two or three from the District of Columbia. They were all companion cases. I believe none of them was in the south, unless we call Washington a southern city.

Another case there is the Bob-Lo case. Another case



was a Utah case which did not involve railroad rules. That was the Utah case.

The Bob-Lo case was the case of a Boat Company which transported people from Detroit over to an island that was restricted to white people. The Boat Company refused to sell a ticket to a negro, so he filed suit under the Michigan statute, which prohibited that sort of thing; and the Supreme Court decided it on that basis—that the Michigan statute was constitutional, under that ruling. That has nothing to do with the case here.

The previous case was decided under a state statute by a state court and, as this Court's opinion pointed out the last time, it has no relation to the railroad rule here involved.

In the Matthews case the only question was as to a charge to the jury. I don't know the status of that case now, but I think it has come back and has finally been disposed of. [fol. 56] Mr. Clark: Yes.

Mr. Crenshaw: Another was *Simmons vs. Atlantic Greyhound Corporation*, 75 F. Supp. 166. That was a bus case, under a bus rule; and the Court shows the difference between that and the Morgan case.

Another one, still more recent, was decided on May 5th by the Supreme Court of the State of North Carolina, which distinguishes between the Morgan case and these other cases that held against it, and upholds the segregation rule of the bus company in that case. The Court said in that case: "We know of nothing that makes segregation per se unconstitutional or violative of any Act of Congress."

That is practically what this Court said in its opinion here. I brought that out for these purposes,—because this matter of segregation is fast becoming a very, very serious problem, and not so much in the south as all over this country. I don't know what the outcome will be. I don't think anyone can say as to that. I think it would be tragic for the ambitions of the negro race. There are white people who do not want to live side by side in their homes and who do not like to be in railroad cars and in dining cars side by side at the same table with negroes.

The railroad rule in this case has to do with whom they serve. If some other railroad, that does not have patronage that demands or requires separation, that is one thing. But, [fol. 57] where they demand it, I doubt that Acts of Congress or decisions of courts can change the custom. And if some-

one wants to call it prejudice that exists in this country, and in almost every country, I don't know whether it will stop it or not. A more tragic means of ending it probably would be a Riot Act. If that occurred in this country, it would be more violent and harmful and damaging to the negroes than anything else. As a good citizen, I would regret it. In other words, it seems to me at this time that the ambitions should be boiled down to something that can reasonably be had and accomplished, and without trespassing upon the rights of other people. The white people have rights, too. They have the right to be prejudiced, if they want to be. We have to live together; and I think the way to live together peacefully is for both sides to be reasonable in their demands. I am saying this not because I think it is part of this lawsuit, but I do think that segregation is a matter which can not be solved in this manner. If it can be done, it will have to be done in some other tribunal.

#### ARGUMENT OF MR. CHARLES CLARK

Mr. Clark: Has there been an order permitting the Southern to intervene?

Judge Coleman: Yes; that has been signed.

Mr. Clark: May it please the Court, I think this case can be presented from a somewhat narrower outlook than [fol. 58] it has been so far. This is the second time that this same case has been before this same Court; that is, if I recall the prior decisions, which I take to be the law of the case. The subsequent decision of the Supreme Court and Judge Paul's decision in the Simmons case support those decisions, that is, that segregation in and of itself, segregation per se, is not a violation of the law and is not, in and of itself, discriminatory.

The case was sent back, following the first trial here, because of an infirmity in the rule of the railroad. That rule provided that there would be two tables, cut off by curtains; but the infirmity in the rule was that those tables were not set aside exclusively for negroes at all times. I think the Court properly sent the case back.

I might say to you that the rule was something of a temporary expediency to meet the wartime demand. If we made an error in that, at least it has now been corrected. So, the case is now narrowed to this simple question: Is the present rule of the Southern Railway, which the Commission has

found to be a reasonable rule, one that meets the test of Your Honors' previous decision? I think it does.

Having tried the case before, it fell to my lot to rewrite the rule to meet the criticism that the Court made of the prior rule. Mr. Dixon and I sat around the table, and we hit upon this rule, that we would set aside a four-seat table at Station No. 1, at all times during the meals, for negro [fol. 59] passengers, and for no one else. The balance of the car would be set aside exclusively, at all times, throughout the entire meals, for white passengers.

Now, across from the table set aside exclusively for negroes is the place formerly occupied by what was first called one of the "Jim Crow" tables. That was a two-seat table; but later on it was made a four-seat table in order to meet the demands of the war emergency. There is no table there now, and the Steward has his desk and his locker box; and there is considerable that he uses there. In that way, he can see the middle of the car and can better supervise the entire operation of it.

In setting aside four seats at this one table, exclusively for negroes, the railroad has furnished the negro diner with approximately ten per cent of the space. I believe it was said it was eight per cent of the space. The Commission said it thought that was a fair and equitable distribution of the space.

If Your Honors please, His Honor, Judge Coleman, asked what would be the situation if we set aside the service for one race at a time. We tried that at one time; but, because of the crowds, there was never any leeway. Hence it was that we hit upon the curtain plan.

Judge Soper: What was that? I did not catch the last thing you said.

Mr. Clark: There was never any provision, under the old [fol. 60] rule, whereby we would serve one race at a time in the car, and then serve the other. We did not have a continuous stream of diners. That is why we hit upon the curtain idea, so that we could serve negroes and whites at the same time. But at that time we did not make the table exclusive; and, if the negroes did not come in, the whites sat there. That is what Your Honors found was the infirmity in the prior rule. It now sets aside this table exclusively at all times for negroes.

I would like to make one slight change in that rule as set out in the Commission's report. It refers to white and

colored persons. When Mr. Dixon and I drew up the rule, we put in "negroes" instead of "colored" persons.

Judge Soper: You did what?

Mr. Clark: We put in the word "negroes" instead of "colored persons". But before it was typed in the operating department, they changed the word "negroes" to "col-order persons".

I recall; I think, that it was Judge Soper who asked: who is the colored person? If the rule should be directed to whites and to negroes, I think it was Your Honors' feeling that it should so state. I would like to correct it to the extent of using the word "negroes" in the place of "colored persons". I did not think it was necessary to reopen the case before the Interstate Commerce Commission to make that simple change.

[fol. 61] I take it there is no objection to changing the words "colored persons" to "negroes".

Judge Chesnut: Mr. Clark, there is some argument here to the effect that the accommodations exclusively set aside for negroes are not actually equal to those of the whites. Have you any argument on that? Is there any evidence on it?

Mr. Clark: The evidence is quite to the contrary, Your Honor.

Judge Chesnut: Of course, the same character of meals and menu are served; I suppose.

Mr. Clark: The record shows that identically the same kind of table, the same kind of table cloths, the same kind of silverware, the same kind of check, and the same kind of waiter are served all patrons in the car. There are six stations, which are numbered. The kitchen-end is numbered one, and they run down to the other end of the car to number six. The waiter serving station No. 1 is the oldest and most experienced waiter in the car. He is given that station because it is nearest to the kitchen, and he does not have to carry the meals very far. When he brings them out and serves them, they are more likely to be hot. He is the best waiter on the car. That is the table that is set aside for the negroes.

There has been some reference to the kitchen-end of the car which suggests that it is not so desirable, or that it is [fol. 62] undesirable. That is not so. The kitchen-end of the car takes up quite a space at one end. Then comes the buffet and the little hallway. Then, when you come



to table No. 1, it is approximately in the very middle of the car; and there the riding is much smoother, I am sure Your Honors will recognize, than at either end. There is no question of steam or heat from the kitchen-end. There is nothing to find fault with there. Mr. Thomas, the Superintendent of dining car service, I think it was, testified that the air conditioning apparatus comes down right there in the middle of the car and gives the best results there. So you have identically the same kind of equipment, the same table, the same tableware, the same napkins, etc., the best waiter on the car, the most convenient one to the kitchen, and the smoothest riding place in the car.

Judge Soper: Why do you put up these absurd partitions? They don't conceal anything; they simply call attention of the white passengers to the fact that the colored person is dining there. It seems to me that it is just unnecessary humiliation. You don't put partitions around the passengers who are seated in the Pullman car, do you?

Mr. Clark: In some they do; in some they do not.

Judge Soper: I am talking about the Southern Railway, your railway. Colored people sit in the Pullman, and they sit next door to these sensitive southern white people. [fol. 63] Mr. Clark: I might answer Your Honor's question in two sections.

Judge Soper: I am suggesting to you that these partitions serve no useful purpose whatsoever. They do not conceal anything; and southern white people do sit in a Pullman car, in the parlor car as they used to call it, in seats immediately alongside of colored people, and without any race riots, so far as I know. What is the purpose of that?

Mr. Clark: Let me explain, first, about the partition. We did have a curtain, which was suspended from a pole that went across the back of the table, out even with the aisle. That was referred to in the previous argument,—that the negroes are set aside, that they are closed in. That was one of the very points. They do not want to be segregated.

Judge Soper: I am asking you why you put in the curtains.

Mr. Clark: We put in the partition to overcome, in large measure, we hoped, that criticism that we were hearing.

Judge Soper: I still ask why you put them in. The colored people do not want them.



Mr. Clark: Simply to separate the two races.

Judge Soper: They do not separate them.

Mr. Clark: Yes, sir; they do.

[fol. 64] Judge Soper: They don't separate them in any real sense. When you come into the car you go right by the colored people.

Mr. Clark: Yes.

Judge Soper: And you sit down on the other side of this partition, and you know there are colored people there. It seems to me it is an absurd device that doesn't do anybody any good. If colored people and white people can be in a sleeping car together and sleep next door to each other, and can sit in the Pullman car next to each other, with no partition, what is the common sense of this thing here?

Mr. Clark: The common sense is that we feel it is a separation; that it is certainly far less offensive than the curtain was; it satisfies the white people, and it certainly is much less offensive to the negroes. So put it that way. It may be that, as time goes on, that curtain will become less and less—Well, it is a separation. It has worked satisfactorily. That is the reason why we put up the partition. Of course, if Your Honor suggests that it would be better to have a curtain, we could go back to the curtain.

Judge Soper: It seems to me it is absurd. It doesn't comply with any law. It does not comply with any state law. It is simply a voluntary and an unnecessary thing, and it [fol. 65] is done by the railroad itself. These partitions do not comply with any law, and the curtains do not comply with any law.

Mr. Clark: We find that it best separates them.

Judge Soper: Why don't you separate the people in a Pullman car?

Mr. Clark: I said I would like to answer your question in two ways. That was the first part. That accounts for the partition in lieu of the curtain.

Now, coming to the Pullman, firstly, the Pullman is not before us today. However, when negroes come for space in a Pullman car, they are given space in one of the enclosed compartments,—the drawing room and bedroom compartments. If, perchance, that is not available, they are given space in the body of the car. There is this difference, that those passengers of the negro race who seek sleeping car accommodations, at the increased rates for this service, are very high class representatives of their race, as a rule.

Undoubtedly, when they come in there, they are less likely to create trouble than the helter-skelter, run of mine who might come into the dining car and sit across the table in the dining car. So, Judge Soper, you might say we can get away with that. But one must recognize the situation in the south. You might think: why is it necessary to do this south of the Potomac River but not in the north. But there is that distinction. And we, running the railroads, [fol. 66] try to meet it. And by the segregation we make, we do say that it is the least offensive of their race. We do just enough, you might say, to get by; and it is no reflection on the negro.

Judge Soper: I think it is absurd. If I were a sensitive white person who would not want to eat in the same car with the colored person, I would get no comfort out of this absurd so-called partition; which doesn't do anything except to be an object of segregation; that is all.

Mr. Clark: Suppose I were to ask Your Honor if it satisfies the passenger to have this arrangement,—and it might satisfy the negro passenger sitting across the table from him,—would Your Honor not think we were reasonable in putting it in?

Judge Soper: It might be. But I think people have more sense than you give them credit for.

Mr. Clark: If we could get out of that, it would be a great saving—

Judge Soper: I am sure of that.

Let me ask you one other question. Bearing in mind that it is to the best interests of the southern community and of the railroads to have segregation, and that you have done the best job you can, that is how you feel about it?

Mr. Clark: I certainly say that with the utmost sincerity. [fol. 67] Judge Soper: I am sure of that.

One thing that is involved is that it is easily possible, especially in these days when colored people have more money and travel more, and are more insistent upon the niceties of life, that the table for colored people would be occupied, and there might be a family or party of more than four come in.

Mr. Clark: That is possible.

Judge Soper: Four would take up this table. But there are seats in the other part of the car that are unoccupied, and another colored man, who is not associated with this other party, comes in, and he can't get a seat; but the white

man who comes in can get a seat. How can you say that is not discrimination?

Mr. Clark: I say it very simply. It is just as fair for one race as it is for the other.

Judge Soper: But it is not just as fair for the one as it is for the other when the greater part of the car is for white people and no colored person can get a seat in it.

Mr. Clark: I am going to answer your question by reversing the order. If there are 44 white passengers dining and the 45th comes in, he stands and awaits his turn. If there are 4 negroes there and a 5th comes in, he stands awaits [fol. 68] his turn. And, more often than not, the white people will be standing, awaiting their table, while the table that is set aside for negroes will not be occupied. That brings up the question of whether or not we have a fair distribution of space. And I remind you that four seats is eight per cent of the capacity of the car, and they are set aside for four per cent of the diners. I think that is extremely fair.

Judge Soper: Where do you get your figures?

Mr. Clark: From an actual check of the records which are kept. The tickets do not show whether they are white people or negroes; but we have to keep a record. That is the result; and that is the finding in the Interstate Commerce Commission's report. You can call it, if you like, temporizing with a troublesome situation. Perhaps that is what it is. You might say that, because we put in these partitions in place of the offensive curtains, we have made a mistake. We can go back to the curtains; but I am quite sure that our negro passengers would resent that more. Since we put up the partitions, we have certainly kept down those troubles which we anticipated. Bear in mind this sharp distinction between the sleeping car space and the diner. There is a marked distinction.

Judge Soper: When did that go into effect?

Mr. Clark: From memory I cannot tell you, Your Honor. [fol. 69] But it went into effect just after your decision.

Judge Soper: March 1, 1946?

Mr. Clark: That is the date.

Judge Soper: I rode on a Southern train and sat at one of the colored tables, and there were no colored people there at the time. That was in 1947.

Mr. Clark: And no colored table?

Judge Soper: I sat at the colored table. There were no colored persons at that table. This was in January, 1947.

Mr. Clark: And you sat at the table?

Judge Soper: Yes.

Mr. Clark: The Steward must have been overawed by you and was afraid to tell you to move.

Judge Soper: He didn't know who I was. Why should he know? I sat alongside of a Georgian, and I asked him about the situation. He said: "I don't mind sitting here. A little while ago some white people came in and insisted upon sitting at the table with the colored people, but the conductor wouldn't let them."

Mr. Clark: We have that to contend with.

Judge Soper: He said they were very angry because they were not allowed to sit there.

I asked: "How do you feel about it?"

[fol. 70] He said: "I think it is all nonsense that they have the restriction. I was born and raised in Georgia."

Mr. Clark: And so was I.

Judge Soper: At that time I think what you meant was the enforcement of the old rule, that is to say, that these tables could not be used by white people as long as any colored person was seated at the table; but after the colored person got out, the white people could come in. Why do white people want to object to eating at the same table where a colored person has eaten? How do you answer that?

Mr. Clark: How do I answer that? I would say, frankly, that since this new rule has been in effect, while I have not eaten on the dining car, having been the father of the rule, I watched to see how it worked. I have not found the situation which Your Honor described. The table is kept exclusively for the negroes. If they do not come in, it remains idle throughout the meal; no matter how many white people stand there to be served. There may be cases where a white person will seat himself there and refuse to move. We do not like to have any disturbance. The Steward may say: "All right. Sit there, if you want to." But the rule is,—and it is in the book—not to do that. We certainly try to enforce it.

Judge Che nut: These are the rules, in similar situations, [fol. 71] which prevail on the Southern Railway and, for instance, the Seaboard, the Atlantic Coast Line, the Louisville



& Nashville, and the Illinois Central, and so on? Is there any standard rule?

Mr. Clark: Their rules are identically like the rule that was before Your Honors in the first case. Whether they have adopted our amended rule, written to reach Your Honor's decision and criticism, I am not entirely clear; but some of counsel with whom I have discussed it have told me that they had recommended the change on their lines. Whether it has actually been put into effect, I do not know.

Judge Chesnut: Is it just by accident or by coincidence that most of these suits have been brought against the Southern?

Mr. Clark: No, Your Honor; that is not true. There are just about as many against the others,—the Atlantic Coast Line and the Seaboard. The Stamps case, which I cited in my brief, was a case against the Louisville & Nashville Railway. As I recall it, when we tried one of these cases recently, there were similar cases against the Louisville & Nashville and the Seaboard that came along. Don't think the Southern is the only one. And, I might say, the Southern Railway is the biggest railroad in the south. We have some 8,000 miles of line; and there is more opportunity for litigation.

[fol. 72] Judge Soper: Maybe you are more truly southern.

Mr. Clark: Well, we are southern. We are trying to do a good job in serving the people we serve.

Judge Soper: Mr. Clark, all of us, of course, have to consider the more recent decisions and these two decisions that have come down. The Covenant Cases and the Morgan case indicate that the present Supreme Court is going to the limit in according privileges to colored people heretofore denied them. I think we have to recognize that tendency. Bearing that in mind, I do have some difficulty in not seeing, when the situation can exist, under your rule, where a colored man and a white man can come into the dining car and the white man can be seated and served but the colored man cannot be seated and served, that there is some discrimination. Take the condition on the bus lines: it would be a very rare thing, probably,—at least it would be somewhat unusual—for a person to get up in the middle of the night and move from one seat to another. But, after



all, that is a rather relatively trivial thing. He goes from one seat to another one which is equally comfortable. That was thought to be sufficient to indicate something that was contrary to law. Now, bearing in mind how narrow that decision was, how can we say that this rule is not discriminatory when it does permit a white person to be served at a time when a colored person cannot be served?

[fol. 73] Mr. Clark: The rule, if Your Honor please, went the other way. It permits the negro to be served while the white person stands.

Judge Soper: I am talking about a case which can happen. You have no more right to deny privileges to white people than you have to colored people. I am saying to you that a situation can exist today when two people can come in, one white and one colored, and the white person can be seated but the colored man cannot. Certainly at that particular juncture he is discriminated against.

Mr. Clark: Your Honor, there is just as much discrimination against the white passenger.

Judge Soper: Then, that is wrong too.

Mr. Clark: I can't agree with you.

Judge Soper: I don't expect you to.

Mr. Clark: The Interstate Commerce Commission is the tribunal to consider the reasonableness of this separation regulation, which has been before it since Report No. 1 of its Reports; and it has come down through the years.

Your Honor speaks of the Morgan case. There the state statute was struck down as a burden on interstate commerce; but the decision, speaking for the Court, very carefully recognized the propriety of a uniform rule and affirmed the Chiles case, which the Supreme Court had decided some years ago.

[fol. 74] "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel".

That is the decision in the Morgan case, which certainly is a very clear recognition of the right to separate. Until the Supreme Court holds differently, I assume that will be binding on the Interstate Commerce Commission and this Court. So we feel that we are presenting here today a rule which meets Your Honors' criticism.

Judge Soper: I am not suggesting to you that segregation

is not lawful, Mr. Clark. I am assuming now, for the purpose of my question, that segregation has the approval of the Supreme Court and has certainly not been distinctly overruled. And there are a number of flat decisions to that effect, as you have pointed out. What I am suggesting to you is that this is not segregation of the kind that the Supreme Court has placed its approval upon. You could run two dining cars. It would be absurd to do it, I admit.

Mr. Clark: You could run two dining cars.

Judge Soper: If you are so certain that you are going to have racial troubles that you have to maintain such segregation, then, maintain it. I admit that you have, and I gladly assume that you have made the best effort you could to be fair and, at the same time, to be practical with [fol. 75] the railroad's money. You have tried to do all of those things; and I admit it. But the question is, when people are demanding their legal rights, whether you have succeeded.

Mr. Clark: If we have one car seating 44 people and we have another seating 44 and the 45th white passenger comes in to be served in the white car, there may not be a single negro passenger in those 44 seats; and it would be just as much discrimination against that white man who could not be seated as if there were 44 negroes and not a white person.

There must be some rational, reasonable, sensible way to work out a practical situation. And it seems to me that the Interstate Commerce Commission has recognized this. It refers to the DeCuir case, which was affirmed by the Court in the Morgan case, and it said:

"that in the absence of legislation by Congress a common carrier is at liberty to adopt such reasonable rules and regulations for the separation of white and Negro passengers as seems to it best for the interests of all concerned, and that the test of reasonableness is the established usages, customs, and traditions of the people carried by it, the promotion of their comfort, and the preservation of the public peace and good order."

That is our text book. That is what we have done, and, we hope, sincerely.

[fol. 76] Judge Coleman: Mr. Clark, so far as you know, have you had any complaints from negroes that this table

for four was not adequate, or that they had to wait too long?

Mr. Clark: Oh, yes; we have had some. And we have had complaints from white people that they could not get service. On those two occasions we had 300 passengers and there were six coaches,—three more than usual. That diner is operated between Washington and Greensboro. It arrives at Greensboro at 9:15 p. m. When we got there, there were numerous white passengers who had not been served at all.

Judge Chesnut: That was during the war?

Mr. Clark: Yes, sir.

Judge Coleman: But since the ruling of the Commission, the last ruling?

Mr. Clark: Undoubtedly there have been some complaints. They say it is not enough. They say they do not think we have set aside enough, because, they say, "under your curtain regime, we had the two tables."

Your Honor, we found out that we had too much set aside; so we set up only one; and we did that only after careful investigation.

Judge Soper: You could use that table very readily for white passengers, if you wanted to; but, in order to maintain segregation, you can't put a white person across the aisle from the colored person.

Mr. Clark: That answers, I think, why we cut that out.

Judge Soper: Isn't that the reason why you moved the Steward's station?

Mr. Clark: That was one reason, but not the sole reason. We thought it best to have the Steward in the middle of the car, where he would be nearer the coach end.

Judge Soper: I don't know how many decades you have been having the Steward the other way. Has any other railroad done it?

Mr. Clark: I don't know whether they have or not.

Judge Soper: Do any of the northern railroads do it?

Mr. Clark: No, sir.

Judge Soper: Obviously, it is done for segregation purposes.

Mr. Clark: Certainly. There is no question about that. In some of the cars we have since torn out the partition and put in a glass partition, which goes up to the top of the car.

Judge Soper: It would not be transparent, would it?

Mr. Clark: It is very transparent.

Judge Soper: Do you mean to say that you have gone to the extent of putting up a glass partition?

[fol. 78] Mr. Clark: In some of the cars. We are trying everything to keep peace. If they do not like it, we can go back to what it was before.

Are there any questions Your Honors would like to ask?

Judge Coleman: I have none.

Judge Soper: Thank you, Mr. Clark.

#### REPLY ARGUMENT OF MR. BELFORD V. LAWSON

Mr. Lawson: I want to clear up some things. Mr. Clark said they tried everything. I recall reading once where a great judge said: Find out what the right thing to do is, and you find out what the law is.

I make no apology for doing what Mr. Dumbald accused me of, about being philosophic. I don't wish to be. I don't know anything about philosophy. I do not wish to be pedantic. But I think there is a lot of truth in that. "Find out what the right thing to do is". That is the first point.

The second point is that they say the Morgan case and the Covenant cases do not apply. I think that is absolutely wrong. I think this Court cannot decide this case except in the light of the expanding tests of these two decisions.

Mr. Clark did not answer your question, and he cannot. That same argument was made in the Supreme Court in the [fol. 79] Covenant Cases, where the petitioner said, "You cannot eliminate these voluntary agreements". Now, specifically, this is what the Court said in the Covenant cases; and it is very pertinent to this case,—talking about the constitutional rights. "The rights established are personal rights"—talking about constitutional rights. "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

This is precisely on the point you are asking about.

Judge Soper: Read it again.

Mr. Lawson: "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny

white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

They were making the point that Mr. Clark just made, that if you do certain things for negroes; it will be discrimination against white people. The Court says that argument does not hold water. They say that no statute is involved here, although this regulation was based upon the statute. They [fol. 80] say it is a voluntary arrangement, an effort on the part of the railway to conform to what they conceive to be the situation.

In the Covenant cases, precisely on that point, the Court said: "Where the enforcement of private agreements,"— And that is what we have here,—a private matter among the Southern railroads to perpetuate this forbidden segregation. "Where the enforcement of the private agreement would be violative of public policy, it is the obligation of the courts to refrain from such exercise of judicial power."

In other words, they come in here and say: "We have to do these things", and they expect the Commission to sanction them. And the Commission has fulfilled the expectations. And now they expect this Court to sanction and condone, by force of its judicial power, these devices to deprive negroes of equal treatment and facilities.

Judge Coleman: Let me ask you this question. You concede, do you not, that if the Southern Railway put on an extra diner on all of its trains where they use diners, a special diner for colored people exclusively, that would be within the law?

Mr. Lawson: Within the law as it now stands, I would have to concede.

Judge Coleman: Then, let's suppose that, having determined the percentage of colored diners they had, that they [fol. 81] use a very small colored dining car, with only one table in it. That may sound like a rather fanciful assumption, but it would be possible—a small diner, with the kitchen equipment and service, and bill of fare, and everything identical with the large diner, except that it was reduced to the percentage basis which they figured and which the Commission has figured in this case, and that the needs of that percentage would be met by one table. Now, do you consider that there is any more discrimination in giving this



one table in the white diner than in giving one table in the exclusively colored diner?

Mr. Lawson: Yes, if Your Honor please, for several reasons. If that one table were put in the middle of the car, or at the other end of the car away from the kitchen and away from the noise and the Steward, then I think your analogy would be perfect. But, if Your Honor please, may I say this? Mr. Clark says this end of the car rides easier and that it is better, and all that sort of thing. Why, then, do they always put the negroes at the kitchen? Why don't they put this "Jim Crow" table in the middle of the car? The can't answer it. I submit, whether they admit it or not, that it is common knowledge that, with that Steward sitting directly opposite this table, and the waiters passing, and with the heat and shut door and the absence of free circulation, it does not meet the requirements of the law. So [fol. 82] they can't answer the question.

Now, to come back to Judge Coleman's question, I think there is another reason which I would like to give, which has been hinted at here several times. The "Jim Crow" table, in the analogy which you gave, cuts off what I think is fundamental,—the freedom of choice. I think that is different from absolute segregation.

Certainly I will not go any further off the record than they did, because Mr. Clark did not make any reply argument, but he made a very fine argument,—an old argument about the love for the negro people. I am not going that far.

Not long ago I went into a diner with my wife, who happens to be light-skinned, and they wouldn't seat me. I had to explain. They wanted my marriage certificate. And there is a lawsuit pending. That is the absurdity of the situation to which this goes.

Judge Coleman: That would apply in the analogy I raised; wouldn't it?

Mr. Lawson: It cuts off my freedom of choice and association. I have a right to associate,—the same as white people,—with my wife in a dining car. We pay the same price in the diner that white people pay, but the white people are seated any place in the car, in the middle or anywhere else. They say: "You must sit up there, [fol. 83] whether you like it or not".

Again, there is freedom of choice for the white people that the negroes do not have. And I think that is different from segregation. I think it is a property right. When these railroads come in and restrict that liberty of locomotion and rights of association and choice, they cut off due process, and they deny that protection of the law. They have the right, but they haven't the right, as said in the *Covenant Cases*, to expect agencies of the Federal Government to sanction and condone and buttress it.

Now, there are two other things that I want to point out. I am appalled at certain types of argument made here. The walls of Jericho are tumbling down, whether or not we like it. It is not a fact that the people in the south want to keep up this custom.

Take, for example, the overwhelming majority of the law students here in Oklahoma. The white students objected to letting this colored girl be admitted to the law school. The same was true at Missouri. Southern white people in 1948, 178 years after the founding of our nation, want to perpetuate this "Jim Crow" situation.

I make no apology for being reminded of what a great judge like Mr. Justice Holmes says in this case, and I realize it must be by slow movement. I submit the *Morgan case* and the *Covenant Cases*, and this Court's decision in [fol. 84] this case, in its formal decision, are moving in the right direction. You would be surprised at the tremendous good this decision has done. They move the Steward off into this corner; they cut it off, they rope it off, and they embarrass us. They deprive us of our right of choice and association.

I submit that if the Southern Railway had the courage to do what this Court has suggested, and eliminate all of this foolishness, the situation would be identical with what it is in the case of the Pullman. There are only a few individuals who stand in the way of the progress of democracy in this case. It was amply illustrated by the courage of Mr. Justice Edgerton, who said this was wrong, and the Supreme Court unanimously agreed.

When these people come in here and say, "We are afraid of the prejudice of the people",—Of course, they have the right to their prejudices. But our argument is that agencies of the Government and the courts have no right to sanction and encourage it.

Now, one final reference to the Morgan case to show what I think is an attempt on the part of the Supreme Court to tear down these walls of segregation. Mr. Justice Reed says, and I quote: "There is need for national uniformity in the regulations for interstate traffic".

That statement is not taken out of its text. They had [fol. 85] decided the case when he said that; and he was making the point generally that in buss transportation interstate, in interstate boat transportation, in interstate railroad transportation and, I think, in interstate dining car transportation, there must be national uniformity in the regulations. So I think these two cases certainly do conform.

Now, one final thing. These carriers, as I understand it, are sort of depositories of state power, even if we do say they cannot do certain things. On the other hand, they are free to do certain things. One thing they cannot do is to expect agencies of the Government to enforce these voluntary agreements.

One point that I overlooked making in my main argument was this. Mr. Clark wants to change "colored person" to "negro". Even if the regulation said "negro", you would have the same question of determining who is a negro and who is colored. So I don't think the word "negro" adds anything to it.

There is one thing I might point out to you,—these statistics that they brought in, talking about the volume of traffic. In the first place, the Supreme Court, in the Mitchell case, said that volume had nothing to do with it. But, even if you consider it, and even realizing that the Interstate Commerce Commission is not bound by technical [fol. 86] rules of evidence, they brought in a steward by the name of Thomas and just submitted some evidence. And I must repeat to you just a few sentences to show that it is inadmissible. I do not mean to be technical, but I make the point that there wasn't before the Commission the kind of facts adequate.

"Mr. Thomas, did you yourself compile this record?"

"A. It was under my supervision. Each steward, as he went out, was told to give his record——"

This is the fifth volume.

"But you yourself did not make any part of the record!"

He hedges. "I supervised the making of the record.

"Are you testifying from any original notes", he was asked, and he said, "Oh, no".

"Who compiled this work?"

"A. It is compiled by my office force."

He was asked: "What steward turned in the record as indicated?"

"A. The various stewards."

"Q. What were their names?"

"A. I don't know."

"Q. Is that true of all these reports?"

"A. That is correct."

[fol. 87] "Q. Calling your attention to exhibit No. 9, that same is true?"

"A. That same is true."

Finally, he comes out and says this:

"Q. I mean do you know of your own personal knowledge the method of compilation of these reports and their accuracy?"

"A. I don't know."

"Q. And you yourself have no personal knowledge?"

"A. I was not in the car and I couldn't possibly."

I submit the Commission should not have countenance that sort of evidence. It is certainly inadmissible.

Judge Chesnut: Have you any contrary evidence?

Mr. Lawson: No; I have no contrary evidence. Realizing that it has nothing to do with it, there is not so much that I can say about it now. It is my job to travel a lot. It is common knowledge that there are four negroes on these trains. The common practice now on these crack trains, these long trains, is to have 8 to 10 negroes.

There is this situation, that, as I say, this regulation is worse than the other one. Admittedly, this fifth negro man has to wait. I submit it is contrary to everything we have had so far.

In conclusion, I simply want to say one thing. And, again, [fol. 88] I make no apology. I think the Morgan case, the Covenant cases, and this Court's decision bear out the truth of it: Mr. Justice Cordozo says in his little book, "The Growth of the Law", at page 71: "What we seek is not justice under the law as it is; what we seek is the kind of justice to which law in its making should conform."

I submit that we, here in this Court today, are making the law, just as the decision of this Court made law before. This is not just another lawsuit. This is a historic case, just as were the Morgan case and the Covenant Cases, because we are arriving at the kind of justice, as law, that goes into the books, namely, christianity and democracy.

Finally, the reason I say the kind of argument that has been made here today is appalling is that it plays right into the hands of subversive forces. The kind of argument that these gentlemen made, with all due respect to them, plays right into the hands of Communism. The antidote to Communism is the practice of christianity and democracy.

Judge Soper: Gentlemen, we will take the matter under consideration.

(Whereupon, at 12 o'clock noon, the Court adjourned.)

[fol. 89-90]      REPORTER'S CERTIFICATE

I certify that the foregoing is a true and correct transcript of the proceedings in the above case.

Ray Farrell, Official Reporter.

[fol. 91]

### Offer in Evidence

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 2455

ELMER W. HENDERSON, 2560 McCullough Street, Baltimore, Md., Plaintiff

vs.

INTERSTATE COMMERCE COMMISSION, Washington, D. C.,

and

THE UNITED STATES OF AMERICA, Defendants

COMPLAINT TO ENJOIN, SUSPEND AND SET ASIDE ORDER OF INTERSTATE COMMERCE COMMISSION—Filed January 26, 1945

### I

The jurisdiction of the Court is in Title 28, U. S. Code, Sec. 41, paragraph 28 and Sections 43-48; Title 49 U. S. Code, Section 17, paragraph 9.



## II

The plaintiff is a citizen of the United States and a resident of the State of Maryland and is employed by the United States Government.

## III

This suit is brought against the Interstate Commerce Commission to enjoin, suspend, set aside and annul the order of the Commission dated September 18, 1944 denying the plaintiff's petition for an order commanding the Southern Railway System to cease and desist from its violations of Title 49, U. S. Code, Sections 3 and 4, paragraph 1; Title 8, U. S. Code; Ch. 3, Sec. 41, 14th Amendment, U. S. Constitution; Secs. 1 and 3, Article IV of U. S. Constitution, Secs. 1 and 2, as a result of which the plaintiff was subjected to undue and unreasonable disadvantage and prejudice and was denied full and equal benefit and protection of the laws of the United States and was deprived of his rights, privileges and immunities as a citizen of the United States traveling in interstate commerce.

[fol. 92]

## IV

The Southern Railway System is a railroad corporation organized under the laws of the Commonwealth of Virginia and is a common carrier engaged in the transportation of persons and property by railroad in interstate commerce, between the District of Columbia and points in the State of Virginia, North Carolina, South Carolina, Georgia, and others; and was so engaged as such common carrier at the time of the grievance hereinafter stated as having been suffered by the plaintiff from the acts of the Southern Railway System; that at the time of said grievances, the Southern Railway System was, for many years prior thereto had been, and is now engaged in interstate commerce and is subject to the provisions of the Interstate Commerce Act and its supplements.

## V

## History of Proceedings

The plaintiff, a Negro, purchased a first-class ticket on the Southern Railway System, together with a Pullman reservation to Atlanta, Ga. On May 17, 1942, he presented the

ticket and Pullman reservation aforesaid and, in exercise of the contractual rights pursuant thereto, boarded a south-bound train in Washington, D. C. at 2:00 P. M. At about 5:25 P. M. on said date, the plaintiff went to the diner attached to said train for dinner. On said diner, two tables, separated by curtains, were reserved for Negro passengers. When plaintiff entered the diner, notwithstanding the reservation for Negro passengers provided, several seats at the aforesaid tables were in use by white passengers, but there were vacant seats. In this circumstance the plaintiff was advised by the dining car steward to return to his seat in the Pullman and wait until notified when he could be served. Thereafter the plaintiff did so but was not notified. The plaintiff thereafter returned to the diner and found that there were still white passengers at the tables reserved for colored passengers but there were also empty seats at those tables. The plaintiff demanded [fol. 93] to be seated and served, whereupon the said steward refused, but offered to serve the plaintiff at his Pullman seat or, in the alternative, offered to serve him in the dining car later when all the white passengers had left the dining car or when all the seats at the tables reserved for colored passengers were vacant. The plaintiff returned to his seat and waited approximately half an hour and then returned to the diner. White passengers were being served in all parts of the car, and interspersed were empty tables and vacant seats. The plaintiff was again refused service. The diner was taken off the train in Greensboro, N. C. and the plaintiff was never served.

## VI

The failure of the railroad to seat and serve the plaintiff was unjust, unlawful, disadvantageous, unreasonable, discriminatory, and in violation of the national transportation policy as set forth by the Congress in U. S. C. A., Title 49, notes preceding Sections 1, 30, and 901, in that the railroad failed to provide plaintiff "fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each".

## VII

The railroad violated Section 3, paragraph 1 of Title 49, U. S. C. in that it practised undue and unreasonable preference and disadvantage against the plaintiff and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) by providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humiliating, discriminating and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons, whose names are unknown to this plaintiff, in respect to transportation and facilities in that it failed [fol. 94] and refused to serve the plaintiff at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes but which were allowed to be used by white passengers.

## VIII

The railroad violated Section 41, Chapter 3, Title 8, U. S. C. in that it denied the plaintiff the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

## IX

The railroad violated Section 43, Chapter 3, Title 8, U. S. C. in that it denied and deprived the plaintiff of his rights and privileges and immunities as a citizen of the United States as guaranteed by Sections 1 and 3 of the 14th Amendment to the U. S. Constitution.

## X

The railroad violated Section 1 of paragraph 4 of Title 49 of the U. S. C. in that it failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation.

## XI

The railroad violated Clauses 1 and 2, Section 2 of Article IV of the U. S. Constitution in that it denied the plaintiff the privileges and immunities to which he was

and is entitled as a citizen of the United States, any laws of any State through or in which the grievances herein complained of occurred to the contrary notwithstanding.

## XII

By reason of the facts stated above the plaintiff was greatly embarrassed and humiliated, had to forego his meal, was denied the facilities and advantages provided by the [fol. 95] railroad for other passengers, and was compelled to hire counsel to seek the enforcement of his rights.

## XIII

That on June 17, 1943 the proposed report of the examiner of the Interstate Commerce Commission found that the violations of the Southern Railway System were discriminatory and prejudicial against the plaintiff but dismissed the complaint.

## XIV

That on June 30, 1943 the plaintiff filed exceptions to the examiner's proposed report and argued the issues orally before Division 2 of the Commission. On May 13, 1944 Division 2 found that the railroad's act was discriminatory but dismissed the complaint, as shown by plaintiff's Exhibit A.

## XV

That on July 13, 1944 the plaintiff filed a petition for further hearing before the full Commission and on September 18, 1944 the full Commission dismissed said petition.

Wherefore, the plaintiff prays:

1. That the Court find that the refusal of the Interstate Commerce Commission to issue an order to the Southern Railway System to cease and desist the violations aforesaid is erroneous and is in contravention of the rights of the plaintiff.
2. That this Court issue herein a preliminary injunction suspending or restraining the enforcement of, and setting aside the order of the Interstate Commerce Commission, dated September 18, 1944, dismissing the plaintiff's petition.
3. That upon final hearing of this cause, a final decree be entered setting aside the order entered in Docket #28895 of the Interstate Commerce Commission.

[fols. 96-101] 4. That the plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper.

Lawson, McKenzie & Windsor, by B. V. Lawson, Jr., 2001 11th St., N. W. — 1, Attorneys for Plaintiff. Josiah M. Henry, Jr., 22 St. Paul Street, Baltimore, Md.

*Duly sworn to by Belford V. Lawson, Jr. Jurat omitted in printing.*

#### CERTIFICATE OF SERVICE

Copies of the above Complaint and Attached Exhibit A served by registered mail on the U. S. Attorney General, Department of Justice, Washington, D. C. and Interstate Commerce Commission, Washington 25, D. C. the 25 day of January, 1945.

B. V. Lawson, Jr.

Service of a copy of the above Complaint and Attached Exhibit A acknowledged this 25th day of January, 1945.

Bernard J. Flynn, United States Attorney for the District of Maryland.

[fol. 102] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 30, 1945

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereto or unto so much or such parts thereof as it is



advised that it is material for it to answer, answers and says:

## I

Answering the allegations of paragraphs I and II of the complaint, the Commission admits jurisdiction of the Court of the action herein and venue of the parties thereto.

## II

Answering the allegations of paragraph III and the unnumbered paragraph between paragraphs III and IV of the complaint, the Commission admits that the order of the Commission dated September 18, 1944, is an order which denies plaintiff's petition for reconsideration and rehearing of the order entered May 13, 1944, together with the report of Division 2, entered the same date, and that these reports and orders were entered in a proceeding [fol. 103] instituted by the plaintiff herein upon a complaint against the Southern Railway Company, a corporation, as defendant, and that plaintiff has the legal right to maintain the action herein, and that the Southern Railway Company is a common carrier, operating in and through the States of Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and other states, and is subject to the provisions of the Interstate Commerce Act.

## III

The Commission alleges that the allegations contained in paragraphs VIII, IX, and XI of the complaint are immaterial, irrelevant, and relate to matters not within the jurisdiction of the Commission to decide, and that such matters have not here been decided and that such matters do not relate to the Interstate Commerce Act or to the order or orders or reports which the complaint herein seeks to annul, and that such matters do not relate to or come within the jurisdiction of the statutory court as provided for by law, 25 U. S. C. 41, 43, 45, 45a, 46, 47, 47a, and 48, because of which the said allegations should not be considered by this Court.

## IV

The Commission denies the implied allegations of the complaint that plaintiff sustained damage or injury by

reason of the report, decision, or orders of the Commission, entered in these proceedings.

## V

Further answering other allegations of the complaint, the Commission alleges that proceedings involved in this action were instituted upon the filing of a complaint by the plaintiff herein with the Commission on October 10, 1942, seeking an order against the defendant, the Southern Railway Company, requiring said defendant to cease and desist violations of the Act, alleged to have been committed by said defendant, in respect to equal and just dining car facilities for Negro interstate passengers, more particularly to discontinue the use of curtains around tables [fol. 104] reserved for Negroes, and the award of damages, attorney's fees and costs, alleged to have been incurred or sustained by the said complainant; that thereafter said complaint was made the subject of hearing held at Washington, D. C., February 24, 1943, under Docket No. 28895, at which hearing evidence was submitted by the parties in interest, including plaintiff herein, following which the examiner submitted his recommended report dated May 28, 1943, to which exceptions were filed by said complainant, plaintiff herein; that following submission of briefs, including brief in behalf of complainant, and oral argument by counsel for the several parties in interest, including complainant, Division 2 of the Commission entered its report and order of May 14, 1944; wherein it was decided that the complainant, plaintiff herein, had been subjected to undue and unreasonable prejudice and disadvantage as a result of a casual incident, and because of bad judgment on the part of an employee on the defendant railroad, and over-crowding of trains due to war conditions, and not because of general practices or rules of defendant, which were held adequate to avoid in the future any inequality of treatment as between Negroes and other passengers seeking dining-car service, for which no order for the future would serve a useful purpose; and that complainant had not sustained any damage in consequence of the violation of Part I of the Interstate Commerce Act, on the basis of which an award of reparation could be made and for such reasons dismissed the complaint; and that complainant filed a petition for reconsideration and further hearing on July

12, 1944, which was denied by the Commission at a general session, by order entered September 18, 1944.

## VI

The Commission further alleges that the findings and conclusions in said report of May 13, 1944, were entered after a full and fair hearing, were and are, and that each of them was and is, fully supported and justified by the [fol. 105] evidence submitted in said proceedings as aforesaid, and that, in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the said proceedings by their respective counsel.

The Commission further alleges that said report and orders, above referred to, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them, that in making said report and orders the Commission did not exceed the authority conferred upon it by law, and denies each of and all of the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all of the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in the said report of May 13, 1944, above referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Allen Crenshaw, Attorney; E. M. Reidy, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of counsel.

[fols. 106-108] *Duly sworn to by Charles D. Mahaffie.*  
*Jurat omitted in printing.*

[fol. 109] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

## AMENDMENT TO ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed May 9, 1945

Comes the defendant Interstate Commerce Commission, and by leave of Court, amends its answer heretofore filed in the above action, as follows:

*Second Defense*

1. Allegations of the answer heretofore filed are adopted and by reference made a part of this amendment.

2. Answering allegations of paragraphs XII and XIII of the complaint, or the implications thereof, if such there be, or as may appear or be implied by other allegations of the complaint, the Commission alleges that this Court is without authority to consider any claim for damages or reparation, because of the preference, prejudice and disadvantage found by the Commission, since claim therefor was filed with and denied by the Commission, prior to the bringing of this action. (Section 9, Interstate Commerce Act, 49 U. S. C. 9).

Interstate Commerce Commission, by E. M. Reidy, Assistant Chief Counsel; Allen Crenshaw, Attorney. Daniel W. Knowlton, Chief Counsel, of counsel.

[fol. 110] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

## ANSWER OF INTERVENING DEFENDANT—Filed May 10, 1945

Comes now Southern Railway Company, intervening defendant herein, and, with leave of court first had and obtained, files this its answer to the complaint herein.

This intervening defendant hereby adopts the answer, as amended, herein filed on behalf of the Interstate Commerce Commission, a defendant in this cause, in the same

manner and to the same extent as though each paragraph thereof were herein fully set out.

Wherefore, having answered, this intervening defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Charles Clark, A. J. Dixon, Attorneys for Southern  
Railway Company, P. O. Box 1808, Washington  
13, D. C.

[fol. 111] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND

No. 2455, Civil Docket

ELMER W. HENDERSON, Plaintiff

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COM-  
MISSION, Defendants

Argued September 24, 1945

Decided Dec. 17, 1945

We concur: Morris A. Soper, U. S. Circuit Judge;  
W. Calvin Chesnut, U. S. District Judge.

Before Soper, Circuit Judge, and Coleman and Chesnut,  
District Judges

OPINION OF THE COURT—Filed December 17, 1945

COLEMAN, *District Judge*:

This is a suit under the provisions of 28 U. S. C. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), whereby the plaintiff seeks to set aside an order of the Interstate Commerce Commission, entered May 13, 1944, with respect to dining car service on the Southern Railway.

On October 10th, 1942, the plaintiff filed a complaint with the Commission alleging (as amended at the original hearing) that the Southern Railway, on May 17th, 1942, had, with respect to its dining car service, unjustly discriminated against him in violation of the provisions of Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. sec. 3(1)), and Section 2, Par. 1 of Article IV of the Constitution of the United States, by failing to furnish him dining car service equal to that furnished white passengers.



The complaint prayed that the Commission require the carrier to cease and desist from the alleged discrimination; in the future to afford complainant and other interested Negro passengers dining car facilities and such other services and facilities as the Commission might deem reasonable and just, equal to those accorded its white passengers, and asked also for damages to be assessed against the carrier because of the alleged discrimination.

The Southern Railway answered the complaint, denying that it had violated any Constitutional provision or any provision of the Interstate Commerce Act or of any other law. The complaint, according to the usual procedure, was referred by the Commission to an examiner for the purpose of conducting a hearing, which was held on February 24th, 1943. At this hearing, complainant alone testified [fol. 112] in his own behalf and six witnesses were heard for the railroad.

The examiner filed his report on May 28th, 1943, recommending that the Commission should find that complainant had been subjected to unjust discrimination and prejudice, but that the situation had been corrected for the future and that, therefore, the complaint should be dismissed. Complainant excepted to the examiner's report, alleging that the Virginia segregation statute (Virginia Code 1942 (Michie), Secs. 3962-68), upon which the examiner relied in part, was inapplicable; that segregation of races is contrary to the Federal Constitution and the Interstate Commerce Act; that damages should be assessed, and that the alleged discrimination and prejudice had not been corrected for the future. Thereupon, the complainant was granted a hearing before Division #2 of the Commission, briefs were filed and oral arguments submitted, and on May 13th, 1944, that Division filed its report (258 I. C. C. 413), making detailed findings of fact and conclusions based thereon, all of which are substantially in accord with the examiner's report and recommendations.

The material facts as found by the Commission and set forth in its report, are not disputed by the parties in the present proceeding, and are as follows: On May 17th, 1942, the complainant, a Negro, citizen of the United States, left Washington at approximately 2 P.M. aboard the Southern Railway's Train #35, for Atlanta, Ga., traveling as a first class Pullman passenger. The train consisted of 1 combination baggage-passenger car, 6 coaches, 2 Pullman

cars and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, which necessitated the use of 3 extra coaches. The Pullman cars were in the rear of the dining car, thus making it necessary for Pullman passengers desiring dining car service to enter the diner alongside the kitchen of the dining car. From this end the tables on the left side of the diner accommodated 4 persons and those on the right side, 2 persons. The diner was equipped with curtains which, when drawn, separated the two tables nearest the [fol. 113] kitchen from the other tables, these curtains extending, when drawn, from the sides of the diner to but not across its center aisle, nor along the aisle side of either of these end tables.

When the diner was opened about 5:30 P.M. on May 17th, 1942, and as the train was proceeding through the State of Virginia, a number of passengers were waiting to enter. It filled promptly. When all tables other than the two tables at the kitchen end of the car had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened, remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at one of the end tables at the kitchen end of the diner was empty when complainant first demanded service but neither then nor later was either of these end tables entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, and from time to time diner patrons were served dinner until it became necessary to decline further service, in order that the car would be clear of patrons when the train reached Greensboro, North Carolina. Complainant was tendered and declined service in his Pullman car space without charge therefor in addition to the regular dining car prices. The service offered him differed from that furnished in the dining car only as respects the place of service. The steward did not send for complainant as he had promised to do because at no time during the meal period was there available space in which complainant could be served in the diner in a compartment separated from tables that were occupied by white passengers. Complainant was one of

many passengers who sought dining car service and who had not been served when the car was removed from the train at approximately 9:00 P.M.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either [fol. 114] before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accom-odated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

In July, 1941, defendant issued to its passenger department employees a circular of instructions concerning accommodations for passengers of different races, which contains the following:

#### **"Dining Car Regulations**

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

On August 6, 1942, these instructions were supplemented as follows:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

[fol. 115] "After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you."

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station", or group of tables, so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers use the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white passengers are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his Pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

On these facts the Commission made three ultimate findings, (1): That defendant's treatment of complainant with respect to dining car service subjected him to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act; but that (2): The defendant's dining car rules and regulations in effect at the time in question, when considered with defendant's supplementary rules and regulations issued on August 6th, 1942, are adequate, and therefore no order in respect to these rules was necessary for the future; and (3): That com-[fol. 116] plainant had sustained no compensable damage



as a result of the disadvantage caused him by defendant. Accordingly, the Commission issued its order on May 13, 1944, dismissing the complaint. Thereafter, complainant petitioned for a hearing before the full Commission, but this was denied by order entered September 18, 1944 and on January 26, 1945, the present proceeding was instituted. In the complaint it is alleged that the treatment given the complainant with respect to dining car service violated (1) Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. Sec. 3(1)); (2) the national transportation policy as defined in that Act (49 U. S. C. A. Sec. 1, note); and (3) the Civil Rights Act, 8 U. S. C. A. Sec. 41, 43, enforcing Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining car tables provided for Negro passengers. The complainant concedes that the Commission's denial of damages is not reviewable by this Court. See *Standard Oil Co. v. U. S.*, 283 U. S. 235; *George Allison & Co. v. United States*, 296 U. S. 546; *Ashland Coal & Ice Co. v. United States*, Fed. (2d) affirmed per curiam — U. S. —.

For a proper understanding of what the Commission decided apart from the matter of damages, we quote the following from its opinion (258 I.C.C. 413, at page 418-419):

"The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See *Chiles v. Chesapeake & O. Ry. Co.*, 218 U. S. 71; and cases therein cited. Section 3(1) of the [fol. 117] act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prej-



udice or disadvantage in any respect whatsoever. In *Mitchell v. United States*, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

"It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

"As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

[fol. 118] "We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose."

The questions presented for our determination in this proceeding are basically two, as evidenced by complainant's contentions, and may be summarized as follows: (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination in and

of itself in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are the present rules and regulations of defendant respecting its dining car service nevertheless invalid because they do not provide substantial equality of treatment in that (a) curtained tables are required for Negroes and not for white; and (b) service at such tables may be refused even though there be empty seats at such tables?

The position of the Interstate Commerce Commission is that (1) although it has found that in the particular instance complainant had been subjected to undue and unreasonable prejudice and disadvantage, it further found that such was the result of a casual incident and not of the Railroad's general practice, and therefore the entry of an order for the future would serve no useful purpose, and the decision of the Commission in this respect being founded upon a rational basis, should not be disturbed; and (2) to order the Commission to require the railroad to do more would be, in effect, to order that segregation cease, whereat neither the Commission nor this Court has jurisdiction in the present proceeding to determine whether or not segregation in and of itself is a discrimination forbidden by the Constitution, the Interstate Commerce Act, or any other Federal statute.

The Southern Railway, as intervening defendant, contends that the finding that its existing rules are adequate, is a determination of fact within the exclusive jurisdiction of the Commission, and therefore may not be upset by this Court.

[fol. 119] The Government has not seen fit to be represented separately and to take part in any phase of this litigation from its inception, as it has the statutory right to do. This, however, does not foreclose the intervening defendant, the Southern Railway, from challenging the action of the Commission. *Interstate Commerce Commission v. Oregon-Washington Railroad Co.*, 288 U. S. 14.

At the outset we must determine whether there is any merit in the jurisdictional question raised by the Commission, namely, that this Court may not alter the Commission's finding of equality of treatment since that is a determination of fact exclusively within the jurisdiction of the Commission.

The Commission's position, it will be seen, is tantamount

to saying that in a case of this kind judicial review of the Commission's action is completely foreclosed, even as respects the question of whether it may have exceeded its statutory or constitutional authority in entering a particular order. We do not understand that such is the law. The Supreme Court said in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139, that two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission have been evolved. "One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. *Only questions affecting constitutional power, statutory authority, and the basic pre-requisites of proof can be raised.* If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n. v. Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U. S. 541." (Italics inserted).

The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to [fol. 120] stand, would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the Interstate Commerce Commission to approve, so we are called upon not merely to review the correctness of a factual situation upon which the Commission has ruled, in a field exclusively within its province,—as for example, one involving rates or other charges by an interstate carrier,—but to rule upon questions, the determination of which has not been, and cannot be exclusively delegated to any administrative body, but must remain subject to judicial review. The fact that the Commission's order is negative in form, i.e., that it dismissed the complaint, makes no difference. *Rochester Telephone Corporation v. United States*, *supra*; *Mitchell v. United States*, 313 U. S. 80.

We turn then to a consideration of the first of complainant's two basic contentions: namely, that any form of racial segregation of interstate passengers in dining cars

should be declared to be, in and of itself, a form of discrimination forbidden by the Federal Constitution and the Interstate Commerce Act.

We must at the very outset recognize the distinction between segregation and equality of treatment. The equal rights clause of the Constitution, Article IV, Section 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discriminating against citizens of other States in favor of its own citizens. *Downham v. Alexandria Council*, 10 Wall. 173; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *LaTourette v. McMaster*, 248 U. S. 465; *Chalker v. Birmingham & N.W. Rwy. Co.*, 249 U. S. 522; *Shaffer v. Carter*, 252 U. S. 37; *United States v. Wheeler*, 254 U. S. 281; *Douglas v. New York, New Haven and Hartford Ry. Co.*, 279 U. S. 377; *Whitfield v. Ohio*, 297 U. S. [fol. 121] 431; *Hague v. C. I. O.*, 307 U. S. 496. Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment. *The Slaughterhouse Cases*, 16 Wall. 36. And it has been repeatedly declared by the Supreme Court that race segregation by State law is not per se an abridgment of any constitutional right secured to the citizen. See *Plessy v. Ferguson*, 163 U. S. 537; *McCabe v. Atchison T. & S. F. Ry. Co.*, 235 U. S. 151; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337. By virtue of the Commerce Clause of the Constitution, Congress might legislate specifically with respect to segregation in interstate travel; but Congress has not done so. However, Section 3, paragraph 1 of the Interstate Commerce Act makes it unlawful to subject any person in interstate commerce to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and this prohibition clearly embraces the matter of dining car facilities, just as seating, sleeping or any other facilities in interstate commerce. *Stamps v. Chicago R. I. & P. Ry. Co.*, 253 I. C. C. 557; *LeFlore & Crishon v. Gulf, M. & O. R.R. Co.*, 262 I. C. C. 403; *Barnett v. Texas & P. Ry. Co.*, — I. C. C. —. Furthermore, the right to a particular accommodation or facility does not depend upon the volume of



traffic, because although the supply of particular accommodations or facilities may be conditioned upon there being a reasonable demand therefor, if such accommodations or facilities are in fact provided, substantial equality of treatment of persons traveling under like conditions cannot lawfully be withheld. *Mitchell v. United States*, supra. Thus, while inaction of Congress as respects segregation in interstate travel is equivalent to a declaration that interstate carriers can separate Negro and white passengers, they may do so only if they afford substantial equality of treatment to members of both races when traveling under like conditions. *Hall v. deCuir*, 95 U. S. 485; *Louisville etc. Railway Co. v. Mississippi*, 133 U. S. 587; *Plessy v. Ferguson*, supra; *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388; *Chiles v. C. & O. Ry. Co.*, 218 U. S. 71; *McCabe v. Atchison T. & S. F. Ry. Co.*, supra. Therefore, although the Supreme [fol. 122] Court of Appeals of Virginia has held, since the Commission decided the present case, in *Morgan v. Commonwealth*, 34 S.E. (2d) 491, that the Virginia segregation laws with respect to public motor carriers, which are kindred to that State's segregation laws with respect to rail carriers—all of which laws were in effect at the time the discrimination against the present complainant is alleged to have occurred,—apply to interstate as well as intrastate passengers, it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decision; and likewise, the railway company does not rely upon them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case because it does not, at least in terms, purport to embrace dining car service. Virginia Code 1942 (Michie) Sec. 3962-B. These sections read: "Sec. 3962. SEPARATE CARS FOR WHITE AND COLORED PASSENGERS.—All persons, natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for the transportation of passengers are hereby required to furnish separate cars or coaches for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach within the meaning of this section, and each



separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters, indicating the race for which it is set apart." "Sec. 3963. Company to Make no Discrimination in Quality of Accommodations for White and Colored Passengers.—No difference or discrimination shall be made in the quality, convenience, or accommodation in the cars or coaches or partitions set apart for white and colored passengers under the preceding section." Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case, because, nothing short of race segregation in [fol. 123] separate cars, or in compartments "divided by a good and substantial partition, with a door therein," would satisfy those provisions.

It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, we turn to a consideration of complainant's second contention, which is that, even though it be held that the defendant carrier may lawfully segregate complainant because of his race while affording him dining car facilities, the segregation actually still permitted by the defendant railroad's present regulations which the Commission has approved is unlawful; because not affording him treatment substantially equal to that afforded white passengers under like conditions.

This contention brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis of the present complaint. Therefore, they are to be treated, for the purposes of this case, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required henceforth to abstain from adopting any rule or regulation with respect to its dining car service that imposes,—as it is claimed the present rules do,—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions. Complainant's

right to complain does not depend upon whether he intends to make a similar journey in the future, *Mitchell v. United States*, *supra*.

These dining-car regulations have been quoted in an earlier part of this opinion in their entirety. It is to be noted that what the present complainant is really seeking is that he shall be given an absolute right to—a guarantee [fol. 124] of—*the same service in every respect* accorded to white passengers under like conditions. The defendant's dining-car regulations in effect on May 17th, 1942, that is, at the time of the alleged discrimination against the complainant, contained only a very general provision with respect to service of meals in dining cars at one and the same time to Negro and white passengers. They merely provided that, "if the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them".

As we have seen, applying his own interpretation to this rule, the dining car steward allowed white passengers to occupy the end seats allotted to colored passengers before the complainant appeared and applied for diner service; and that, since the train was crowded with white passengers, he, the steward, continued to allow additional white passengers to be seated and served at these end tables, with the result that there never was a time during the hours when the dining car was open to passengers, that meals could be served therein to the complainant or to any other Negro passengers, at any table at which there were not one or more white passengers. This, as we have seen, the Commission found resulted in an unjust, undue and unreasonable prejudice and disadvantage to complainant in violation of Section 3(1) of the Interstate Commerce Act. It is our opinion that this conclusion was correct. However, the Commission further found that the supplementary dining car regulations put into effect by the defendant carrier on August 6th, 1942, adequately provided against the recurrence of such prejudice and disadvantage as respects complainant or any other possible Negro passengers on defendant's lines, and therefore, the Commission deemed the entry of an order for the future would serve no useful purpose. We are thus called upon to determine whether or not this interpretation by the Commission of the carrier's rules now in effect is correct; that is to say, we must deter-

mine whether they do, in fact, afford substantial equality of treatment to both Negro and white passengers with respect to dining car service.

We requote the pertinent parts of these supplementary [fol. 125] instructions as follows: "Before starting each meal pull the curtains to service position and place a "reserve" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves, they should be advised that they will be served just as soon as those compartments are vacated."

It is to be noted that the above instructions do not in fact require the setting aside of the two tables referred to *exclusively* for Negro passengers, but merely say that they "are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed, and white passengers served at those tables. Obviously, the word "then" refers to any time during which meals are being served when there happen to be more white passengers applying for meals than can be accommodated at other than the reserved tables. At least if it does not mean this, it gives no indication to the steward as to how long he should wait before assuming that no Negro passengers *will* present themselves. Nothing is contained in the regulations requiring the steward to take steps to ascertain whether there be any such persons on the train. Furthermore, the regulations do not take into account the probability that a Negro passenger may not desire a meal as soon as he boards the train and the dining car opens, or that he may board the train at an intermediate point after the dining car service has been begun and may desire at that time or later to be served in the dining car. In none of these contingencies do the regulations offer any assurance that the Negro passenger will have a reasonable chance to be served in the dining car before his journey ends.

Therefore, we believe that the Commission erred in hold-

ing that the defendant's general practice as evidenced by its [fol. 126] current instructions, will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service. In the case of the white passenger, he is merely required to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of the car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But nevertheless in our opinion the regulation so construed, applied and practiced does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers by the reservation of particular tables for colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers [fol. 127] when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently



applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers, or if none there, elsewhere in the dining car.

The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at 96-97): "It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specially assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passenger cannot, the latter are subjected to inequality and discrimination because of their race.' . . ."

"While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served [fol. 128] in coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again, the analogy to the Mitchell case



is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches.

There remains to be considered one additional contention of the complainant, namely, that that part of the railroad's regulations which requires tables for Negro passengers in dining cars to be curtained also violates the rule of substantial equality in that such means of separation causes Negro passengers humiliation and embarrassment to which white passengers are not subjected. Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine.

For the reasons given herein, the order of the Commission dismissing the complaint must be set aside and the case remanded to the Commission for further proceedings in the light of the principles outlined herein.

William C. Coleman.

[fol. 129] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND

Civil Docket No. 2455

ELMER W. HENDERSON, Plaintiff

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, Defendants

DECREE—Filed February 18, 1946

This cause coming on to be heard the 24th day of September, 1945 before the regularly constituted statutory Court, all parties being represented by counsel, the case being submitted to the Court upon the pleadings, certified record of the proceedings before the Interstate Commerce Commission, the briefs, and argument of counsel, it is by the Court this 13th day of February, 1946

Ordered, adjudged and decreed that the Order of the Interstate Commerce Commission entered on May 13, 1944 dismissing the complaint of Elmer W. Henderson vs. South-

ern Railway Co., Interstate Commerce Commission Docket No. 28895, be, and the same hereby is annulled and set aside and this case be, and the same hereby is remanded to the Interstate Commerce Commission for further proceedings in the light of the principles outlined in the Opinion of this Court, in the above entitled cause.

Morris A. Soper, United States, Circuit Judge;  
William C. Coleman, United States District Judge;  
W. Calvin Chesnut, United States District Judge.

Approved, as to form:

Charles Clark, Attorney for Southern Railway System;  
Allen Crenshaw, Attorney for Interstate Commerce Commission.

[fol. 130]

### Offer in Evidence

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28895

ELMER W. HENDERSON, 2560 McCulloh Street, Baltimore,  
Md., Complainant,

v.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT—Filed October 10, 1942

The Complaint of the above-named complainant respectfully shows:

I. That complainant is a citizen of the United States and a resident of the State of Maryland. He is employed by the United States Government, as field representative of the Fair Employment Practices Committee.

II. That the defendant above-named is a railroad corporation organized under the laws of the Commonwealth of Virginia and is a common carrier engaged in the transportation of persons and property by railroad in interstate commerce, between the District of Columbia and points in the States of Virginia, North Carolina, South Carolina,

Georgia, and others, and was so engaged as such common carrier at the time of the grievance hereinafter stated as having been suffered by the complainant from the acts of the defendant; that at the time of said grievances the [fol. 131] defendant was, for many years prior thereto had been, and is now engaged in interstate commerce and is subject to the provisions of the Interstate Commerce Act and its supplements.

III. The complainant, a Negro, purchased a first-class ticket on the Southern Railway together with a Pullman reservation to Atlanta, Georgia. On May 17, 1942, he presented the first class ticket and Pullman reservation aforesaid and in exercise of the contractual rights pursuant thereto boarded a southbound train in Washington, D. C. at 2:00 P. M. At about 5:25 P. M. on said date, the complainant went to the diner attached to said train for dinner. On said diner, two tables, separated by curtains, were reserved for Negro passengers. When complainant entered the diner, notwithstanding the reservation for Negro passengers aforesaid, several seats at these tables were in use by white passengers, but there were vacant seats. In this circumstance the complainant was advised by the dining car steward to return to his seat in the Pullman and wait until notified when he could be served. The complainant did so but was not notified. Thereafter the complainant returned to the diner and found that there were still white passengers at the tables reserved for colored passengers but there were also empty seats at those tables. The complainant demanded to be seated and served, whereupon the steward refused but offered to serve the complainant at his Pull- [fol. 132] man seat or, in the alternative, offered to serve him in the dining car later when all the white passengers had left the dining room, or when all the seats at the tables reserved for colored passengers were vacant. Complainant returned to his seat and waited approximately half an hour and then returned to the diner. White people were being served in all parts of the car, and interspersed were empty tables and empty seats. Complainant was again refused service. The diner was taken off the train at Greensboro, North Carolina, and the complainant was never served.

IV. The failure of the Railroad to seat and serve the complainant was unjust, unlawful, disadvantageous, un-

reasonable, discriminatory and in violation of the National transportation policy as set forth by the Congress in U. S. C. A., Title 49, notes preceding Sections 1, 30, and 901, in that the defendant failed to provide complainant "fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each".

V. The defendant violated Section 3, paragraph 1 of Title 49, U. S. C. in that it practiced undue and unreasonable preference and disadvantage against the complainant and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) by providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humiliating, discriminatory [fol. 133] ting and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons whose names are unknown to this complainant in respect to transportation and facilities in that it failed and refused to serve complainant at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes but which were allowed to be used by white persons.

VI. The defendant violated Section 41, Chapter 3, Title 8, U. S. C. in that it denied complainant the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

VII. The defendant violated Section 43, Chapter 3, Title 8, U. S. C. in that it denied and deprived the complainant of his rights and privileges and immunities as a citizen of the United States as guaranteed by Sections 1 and 3 of the Fourteenth Amendment to the United States Constitution.

VIII. The defendant violated Section 4 of Title 49 of U. S. C. in that it failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation.

IX. The defendant violated Clauses 1 and 2, Section 2 of Article IV of the United States Constitution in that it [fol. 134] denied the complainant the privileges and immunities to which he was and is entitled as a citizen of the United



States, any laws of any state through or in which the grievances herein complained of occurred to the contrary notwithstanding.

X. That by reason of the facts stated above the complainant was greatly embarrassed and humiliated; had to forego his meal, was denied the facilities and advantages provided by the defendant for other passengers, and was compelled to hire counsel to seek the enforcement of his rights.

Wherefore complainant prays:

(1) That the defendants be required to answer the charges herein;

(2) That after due hearing, in Washington, D. C., and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and in the future to establish, apply and enforce for the transportation of complainant and other Negro interstate passengers equal and just dining car facilities and such other services and facilities as the Commission may consider reasonable and just;

(3) That the defendant be required to remove and discontinue the impracticable and unequal and humiliating practice of using curtains around the tables reserved for Negroes;

(4) That reasonable and just damages, attorneys' fees [fol. 135] and costs be assessed against the Railroad for the aforesaid violations;

(5) That such other and further orders be made as to the Commission may seem proper and just in the premises.

Belford V. Lawson, Jr., 2001 11th Street, N. W., Washington, D. C. Dupont 6250. Earl B. Dickerson, 3507 South Parkway, Chicago, Illinois; Marjorie McKenzie, 2001 11th Street, N. W., Washington, D. C., Attorneys for Complainant.



[fol. 136] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28895

[Title omitted]

ANSWER—Filed November 6, 1942

The answer of Southern Railway Company to the complaint.

For answer to the complaint, defendant says:

I

Answering paragraph one of said complaint, defendant has no knowledge or information sufficient to enable it either to affirm or deny the allegations contained therein and asks proof thereof.

II

Answering paragraph two of said complaint, defendant admits that it is a common carrier by railroad engaged in part in interstate commerce, and that as to such commerce, it is subject to the Interstate Commerce Act in so far as the same is constitutional and enforceable.

III

Answering paragraph three of said complaint, defendant is without knowledge or information sufficient to enable it [fol. 137] either to affirm or deny the allegations contained therein and asks strict proof thereof.

Further answering said paragraph three, this defendant admits that on its train which leaves Washington, D. C., at 2:00 P. M., for Atlanta, Georgia, it is customary to take the diner off at Greensboro, North Carolina.

IV

Answering paragraphs four, five, six, seven, eight, nine, and ten, this defendant denies the allegations contained therein.

Further answering said complaint, this defendant denies that it has violated any section of the Interstate Commerce Act as alleged in the complaint, or any of the laws of the United States of America, or the Constitution of the United States, or that anything done or omitted by this defendant

with respect to the subject matter of this complaint is in violation of law or that it should be subjected to any adverse order; and this defendant denies the complainant is entitled to the relief prayed or any other relief. Each and every allegation in said complaint not hereinbefore admitted is hereby specifically denied.

[fols. 138-139]. And, having fully answered, this defendant prays that the complaint be dismissed.

W. N. McGehee, H. G. Hedrick, Counsel for  
Defendant.

McPherson Square, Washington, D. C.  
November 4, 1942.

#### Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to Belford Y. Lawson, Jr., 2001 11th St., N. W., Washington, D. C., Earl B. Dickerson, 3507 South Parkway, Chicago, Ill., and Marjorie McKenzie, 2001 11th St., N. W., Washington, D. C.

Dated at Washington, D. C., this sixth day of November, 1942.

W. N. McGehee.

[fols. 140-141] BEFORE THE INTERSTATE COMMERCE COM-  
MISSION

No. 28895

ELMER W. HENDERSON

VS.

SOUTHERN RAILWAY COMPANY

TRANSCRIPT OF HEARING

Hearing Room "B", I.C.C. Bldg., Washington, D. C.

Friday, February 24, 1943.

Met pursuant to notice at 9:30 a.m.

Before H. W. Johnson, Examiner.

APPEARANCES:

Belford V. Lawson, Jr. and Marjorie McKenzie, 2001 11th St., N.W., Washington, D.C., appearing for complainant.

Charles Clark and A. J. Dixon, Southern Railway Building, Washington, D.C., appearing for defendants.

[fol. 142]

PROCEEDINGS

Exam. Johnson: The hearing will come to order.

The Commission has set for hearing at this time and place Docket No. 28,895, Elmer W. Henderson versus Southern Railway Company.

Who appears for the complainant?

Mr. Lawson: Belford V. Lawson, Jr., and Miss Marjorie McKenzie, who will be here shortly. She had to go to the District Court this morning. (was present later in the morning—H.W.J.).

Exam. Johnson: That will be all right.

For the defendant?

Mr. Clark: A. J. Dixon and Charles Clark, Southern Railway Company Building, 15th and K Streets, Northwest, Washington, D. C. Both have been admitted to practice before the Commission.

Exam. Johnson: You are a member of the practitioner's bar, are you not?

Mr. Lawson: I regret that I neglected to say that some months since I filed my application as advised by the rules. They advised me that I would hear from them in due course.

Exam. Johnson: You haven't heard from them?

Mr. Lawson: No.

Exam. Johnson: You understand it is approved?

Mr. Lawson: Yes.

Exam. Johnson: All right.

[fol. 143] Are there any interveners in this case?

(No response.)

#### STATEMENT OF THE ISSUES

Exam. Johnson: I will read the issues.

There were a few points in the complaint that were not under the jurisdiction of the Commission. So I have written out the issues as I see them, and I think that they are satisfactory to all the parties.

By complaint filed October 10, 1942, racial discrimination is alleged in the refusal of defendant to extend to complainant accommodations equal to those furnished to white passengers in dining car service on a trip from Washington, D.C. to Atlanta, Georgia on March 17, 1942, in violation of Section 3 of the Interstate Commerce Act and the Fourteenth Amendment to the Constitution of the United States guaranteeing equality of rights and protection under the laws.

The Commission is asked to direct defendant to cease and desist from the alleged unjust and discriminatory practices in the furnishing of such accommodations and to establish for the future for the transportation of complainant and other Negro interstate passengers equal and just dining car treatment and facilities.

Mr. Henderson, is that a correct statement of the issues as you understand them?

Mr. Henderson: I am satisfied with that issue. I think it covers all the corollary issues.

[fol. 144] Exam. Johnson: Your whole case is based on the dining car service and the treatment, as I understand it.

Mr. Lawson: Discrimination in dining car service and practices, yes.

Exam. Johnson: Mr. Clark, Are those the issues as you understand them?

Mr. Clark: Generally speaking, yes, Mr. Examiner. But



I see no purpose in referring to the constitutional provisions in your summing up of the issues, because that is not a matter within the jurisdiction of the Commission as such. Certainly it is unnecessary to plead the law.

I also object to and move that you strike from your statement of the issues the reference to racial discrimination. The Commission has jurisdiction of discrimination, however it arises. It remains to see in what respect the evidence shows. I am not sure that I get from the complaint the idea that it is racial. With that suggestion, your statement is correct.

Mr. Lawson: Of course, we oppose the deletion of the word "racial," because the very foundation of our case is racial, as I think the complaint sets forth; and I think the evidence will corroborate it.

Exam. Johnson: I think that is all right.  
The complainant may call its first witness.

#### MOTION TO STRIKE FROM COMPLAINT

Mr. Clark: Before we proceed with the first witness, in view of your statement of the issues, may I merely, for the [fol. 145] Purpose of clarifying the record, move we strike from the complaint the allegations of paragraphs 4, 5, 6, 7, 8, and 9?

Also, I move we strike therefrom—

Exam. Johnson: 4—

Mr. Clark: 3, 6, 7, 8, and 9. Those are the ones I recollect would fall under your summarization of the issues.

I merely do that to protect the record.

Exam. Johnson: 4 seems to come under it very clearly. I will read that:

"The failure of the railroad to seat and serve the complainant was unjust, unlawful, disadvantageous, unreasonable, discriminatory and in violation of the National transportation policy as set forth by the Congress in U. S. C. A."

That it is U. S. Code, Annotated, I guess it is. "Title 49"—that is the Interstate Commerce Act.

"Title 49, notes preceding Sections 1, 30, and 901, in that the defendant failed to provide complainant 'fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so admin-

istered as to recognize and preserve the inherent advantages of each.' "

Mr. Lawson: Yes.

Exam. Johnson: 3, 6, 7, 8, and 9, as not coming under the jurisdiction of the Commission.

[fol. 146] Mr. Clark: Yes.

Exam. Johnson: What have you to say in regard to those separate issues, Mr. Lawson? They were not covered by the statement of the issues, as I read them, and to which you agree. I note they were correct.

Mr. Lawson: I think your issue covers generally our case. However, I think the Interstate Commerce Act is Section 49.

Exam. Johnson: That is right.

Mr. Lawson: Anything referred to in that section seems to be relevant and ought not to be deleted. Two of these paragraphs suggested by Mr. Clark for deletion suggest Title 49, which is the Act. Certainly anything within the four corners of the Act is relevant. And as I understand it, your issues are predicated upon that section.

Exam. Johnson: But sections 6 and 7 do not refer to those.

Mr. Lawson: I would be willing to concur in Mr. Clark's recommendation that they be deleted.

Exam. Johnson: What ones?

Mr. Lawson: 6 and 7, because there is a question of the Fourteenth Amendment.

Exam. Johnson: 6 and 7 will be considered as not having anything to do with this case.

[fol. 147] Mr. Lawson, I believe Section 8 there must be wrong—violated Section 4 of title 49. Will you check on that, please?

Mr. Lawson: What are you reading from?

Exam. Johnson: That is Section 8. I think that must be part 1, paragraph 4. I haven't got a copy of the code here. I believe that is Section 4, title 49, and that would refer, of course, to the long and short haul clause of the I. C. C. Act.

Mr. Clark: I can't see, Your Honor, where that has any bearing whatever, though, of course, I recognize it as part of the Act, just like a reference to the national transportation policy act of Congress, but it has nothing to do with the issues in this case.

Exam. Johnson: Off the record.

(Discussion off the record.)

Exam. Johnson: Article 9 of the complaint will not be considered in this case.

Mr. Clark: Has the reporter your ruling on 6 and 7?

Exam. Johnson: Yes, that is in the record; that 6 and 7 and 9 are out of the record.

Mr. Clark: I move that we strike from the prayer of the complainant that attorneys' fees and costs be awarded to the complainant.

Mr. Lawson: I concur in that. The Act doesn't provide [fol. 148] for it.

Mr. Clark: That is all on that subject.

Exam. Johnson: All right.

Now complainant may call its first witness.

The date of the brief will be March 26, 1943.

ELMER HENDERSON WAS SWORN and testified as follows:

Direct examination.

By Mr. Lawson:

Q. What is your name?

A. Elmer W. Henderson.

Q. Where do you live?

A. I live at 2560 McCulloh Street, Baltimore, Maryland.

Q. Were you on May 17, 1942, and are you now employed by the Federal Government?

A. I am and I was.

Q. In what capacity?

A. I am a field representative for the President's Committee on Fair Employment Practices in the War Manpower Commission.

Q. Calling attention to May 17, 1942, did you have occasion to board the Southern Railway train in Washington?

A. I did.

Q. How were you traveling?

A. I was traveling first-class Pullman.

Q. I show you receipt Pullman 27569, indicating that you were a first-class passenger. Was that receipt given you [fol. 149] by the Pullman Company?

A. That was.

Mr. Lawson: I suppose there is no objection to that. We might stipulate that he was on the train as a first-class passenger.

Mr. Clark: This, Mr. Examiner, is a slip of the Pullman Company-entitled "Passenger Cash Fare Check No. EN-27569, Car S-24," as I make it out, from Washington to Atlanta. One passenger, lower berth No. 7. We don't question the authenticity of that slip.

Mr. Lawson: Mr. Clark, may we stipulate he was an interstate passenger on your train, to save time?

Mr. Clark: From Washington to Atlanta would be interstate, without question.

Mr. Lawson: Yes.

By Mr. Lawson:

Q. On that date did you have occasion to go into the dining car?

A. I did.

Q. And that was train 35, operated by the Southern Railway?

A. That is right.

Q. You were enroute to Atlanta?

A. That is right.

Q. About what time did you go into the diner the first time?

A. About twenty-five minutes after five o'clock in the afternoon.

[fol. 150] Q. You know whether or not that was the first call to dinner?

A. It was soon after the first call to dinner.

Q. When you went into the car the first time was it crowded?

A. No, it was not.

Q. How many passengers, or how many diners, I suppose you would call them, would you say were in the car?

A. It would be difficult for me to estimate the number, but several of the tables were occupied. I would say that probably one-third to one-half of the tables were occupied.

Q. Do you have in mind all the tables or the tables reserved for Negroes?

A. I was referring to all.

Q. All the tables?

A. Yes.



Q. To whom did you first talk when you got in the diner?

A. I first talked to the steward.

Q. Will you tell the Commissioner in your own words just what happened, what conversation you had with the steward, and just what happened to you on that occasion?

A. When I went into the dining car that afternoon after the first call for dinner, I was first stopped by the steward, who asked me what did I want. I told him I would like to be served. He said he would not be able to serve me, inasmuch as the two tables that I could be served at were not [fol. 151] empty. As I observed, there was one lady sitting at a two-seat table behind a curtain, which was undraped at the time, and there were two gentlemen seated at a four-seat table behind the draped curtain on the other side.

Q. What kind of table?

A. Four-seat table. In other words, there was one seat vacant at the two-seat table that I was particularly referring to, and there were two seats vacant at the four-seat table. There were other seats vacant elsewhere in the car. Of course, I don't remember exactly where they were.

The steward told me that I would not be able to be served at that time and suggested that I return to the Pullman car, and that he would call me. I stated that I would wait, which I did, about fifteen minutes. During that period he still refused to serve me, and I retired. I returned about 7 o'clock, as I recall, and at this time there was a considerable crowd in the dining car, but as I recollect, there were empty seats at some tables.

I again asked the steward for service and he said the Jim Crow laws in the South and the States through which we were traveling prevented him from serving me at that time. He said, "I am supposed to ask you if you want to be served in the Pullman car." I refused. He said, "Then I can only serve you in the dining car if and when these tables are vacant," referring to the tables behind the undraped cur-[fol. 152]tains. I insisted that I be served, but he refused. I returned to the Pullman car. I went back again in about half an hour from that time and the steward stated that he would call me in a short while, if I would return to the Pullman car, which I did. He did not call me at any time and the dining car was taken off the train at Greensboro, North Carolina, as I recall, about 9 o'clock in the evening. That was the substance of my experience.

Q. You made three visits?

A. I made three visits to the dining car.

Q. Each time you went were there vacant seats at the Jim Crow tables?

A. I am not sure there were vacant seats at them the last time I went in. I do know there were vacant seats the first two times I went. I just couldn't recall about the last time.

Q. On the occasions when you went in each time did you talk to the steward?

A. I did.

Q. And during those conversations were there other people, waiters or other passengers close enough to overhear the conversation between you and Lieut. Farrell or the steward?

A. It is possible, Mr. Counsel, but I seriously doubt it. I was standing right at the door; as I said, there were occupants at the table in front of me, one occupant of the table on the side. At no time, however, do I recall them being [fol. 153] interested enough to look up, although other persons in the car who I know couldn't hear what the conversation was, did look up.

Q. Do you remember how many passengers were at each of the Jim Crow tables on your first visit?

A. Yes, I do.

Q. How many?

A. There were two at the four-seat table and one at the two-seat table.

Q. On the second visit how many passengers?

A. I don't remember exactly how many, but I am sure there was a vacant seat at either table at the time of my second visit. I recall very vividly one person got up and another white person was seated.

Q. On either of those occasions there were places for you to have been served, at those or others reserved for Negroes?

A. Absolutely.

Q. Were there other passengers in line waiting to be served?

A. When I first went into the dining car there were no other passengers in line. I was the only passenger there. I stood there about fifteen minutes, I recall. During that time several passengers came in and were seated, but there was no line in which people were waiting for tables.

Q. Do you recall whether or not any of those passengers were seated at the reserved tables?

A. On my first visit I don't recall whether passengers

[fol. 154] were seated at the reserved tables. On my second visit I do recall that passengers were seated at the reserved tables while I was standing there.

Q. About this curtain. First, did the steward say anything to you about seating passengers in order of their appearance?

A. No, he didn't.

Q. Did he say anything to you about any written or published rule or regulations under which he was working?

A. He referred in one instance to the laws of the states, Jim Crow laws he called them. He said that under those laws he wasn't able to serve me. He also referred indirectly to, apparently, a regulation which he received, or instructions from the railroad company. He said, "I am supposed to ask you if you will be served in the Pullman car." I assumed thereby he was referring to some instructions which he had.

Q. Did he say anything to you as to whether or not those instructions or regulations were oral or written?

A. He did not state.

Q. Did he tell you that if and when he did seat you you would have to sit behind this curtain?

A. No, but he implied that. He said that I couldn't—I beg your pardon. Please scratch that. Yes, he did specifically refer to the fact I could only be seated at the two tables. He said, "I can't seat you at these tables until they are empty," meaning the two tables there. If I recall, those [fol. 155] were his exact words. He said, "I must empty these tables."

Q. In other words, you understood the only way you could be served was for one of the Jim Crow tables to be absolutely vacant?

A. I don't know about one—one or both of the Jim Crow tables had to be absolutely vacant, I am sure, before I could be served, if I could be served at all.

Q. There is no question in your mind about that?

A. No question in my mind at all.

Q. Did he suggest that he serve you in your Pullman seat?

A. He stated that "I am supposed to ask you if you will be served in your Pullman seat," and I refused such service.

Exam. Johnson:

Q. On what one of your trips was that?

The Witness: That was the second trip.

By Mr. Lawson:

Q. Did he say anything about an extra charge for serving you at your Pullman seat?

A. No, he didn't mention that at all.

Q. What did you say was the approximate time of your last visit to the diner?

A. It was around 7:30, I believe.

Q. To the best of your recollection, the diner was cut off around 9 o'clock?

A. I know it was, because I got off the train at Greensboro. We were standing in the station there for five or ten minutes, and I observed them taking the dining car off the train.

[fol. 156] Q. I suppose you were hungry, were you not?

A. I was.

Q. You were unable to get a meal at any time on that trip?

A. At any time on that trip. We didn't get into Atlanta until 6 or 7 o'clock the next morning.

Mr. Lawson: You may inquire, Mr. Clark.

Cross-examination.

By Mr. Clark:

Q. Let us see if I understand your testimony.

A. Yes.

Q. The first time you went into the diner was 5:25 p. m.

A. Yes, it was.

Q. The second time you went in was 7 o'clock?

A. Seven or a little after.

Q. The third time you say you went in was about thirty minutes thereafter, which would make it 7:30 p. m.

A. Yes, I think so.

Q. When you first went in, or when you went in the second time, it makes no difference, what was it the conductor or the steward of the car said to you about serving you in your seat in the Pullman car?

A. It was on the second trip that he mentioned that.

Q. What did he say?

A. He said, "I am supposed to ask you if you will be served in your Pullman seat."



Q. That is what I wanted to get clear. Didn't you understand [fol. 157] stand he was offering to serve you in your seat at the Pullman?

A. Absolutely refused.

Q. The way you put it I wasn't sure.

A. Yes.

Q. He did, either the first or second time, offer to serve you in your seat in the Pullman car?

A. Yes.

Q. He didn't propose to serve you anything extra for that?

A. He didn't mention anything about charges.

Q. Your Pullman car was next to the diner?

A. I think it was the second.

Q. One car removed.

A. One car removed, or the second, I don't remember.

Mr. Lawson: As I recall, I didn't mention anything about that on my direct examination. Of course, he would not have the right to examine about anything except what was brought out on direct.

Exam. Johnson: You can bring that out on your direct.

By Mr. Clark:

Q. The fact is, he offered to serve you in there?

A. Yes.

Q. You said no?

A. Yes.

Q. You went back?

A. Yes.

[fol. 158] Q. Why didn't you accept that?

A. Why did I not?

Q. Yes.

A. Because I felt under the law I had a perfect right to eat in the dining car, if there were seats available at the tables.

Q. Just at the end of your testimony on direct you said you were hungry; that you were unable to get food.

A. That is right.

Q. Here is a man offering to feed you sitting in your seat where you wouldn't have to move. I want to know why you wouldn't let him do it.

Mr. Lawson: I object.

Mr. Clark: What is the ground?

Mr. Lawson: I think this is no small matter. We are dealing here with facts. We are not speculating about this man's hunger. Mr. Clark is fixing to ask him if he was hungry why didn't he take the steward's offer. I think that is irrelevant. That has nothing to do with the facts in this case. It is not speculation or opinion we are dealing with. It is a question of fact.

Exam. Johnson: I am inclined to believe that is a good objection, as to why he did not want to eat in the diner.

Mr. Clark: Counsel provoked the question by asking the man if he was hungry. He is asking to be compensated. He is being hurt. He was hungry. He was tendered food. [fol. 159] Why didn't he eat? I still think it is a proper question. That is a very important question.

Exam. Johnson: I will uphold that objection.

Mr. Clark: Then I may not ask him about that. Very good, sir.

By Mr. Clark:

Q. Who did you say you were at that time working for?

A. The President's Committee on Fair Employment Practices, War Manpower Commission.

Q. Is that the committee that recently put out an order against the Capital Traction Company here?

Mr. Lawson: I object.

Exam. Johnson: May I have that again?

Mr. Clark: He told us whom he was working for. I am trying to find out something about his committee, his employer, his background; asking if that is the committee which recently ordered the Capital Transit Company, our bus and street line here, to put on Negro bus drivers, Negro conductors and motormen.

Exam. Johnson: I think that is all right.

Mr. Lawson: I object to that strenuously. I think it is to raise the racial question this. Second, I can't see any testimony having to do with his employer. He testified where he worked. He doesn't know anything about his employer or what his employer has done. I think it very [fol. 160] obviously objectionable.

Exam. Johnson: If he doesn't know, of course he can so state.

Mr. Clark: Will you answer that question, please? He put racial in the issue.

The Witness: Yes; that is the committee.

By Mr. Clark:

Q. How long have you been in its employ?

A. Since November 3, 1941. This was May 17, 1942.

A. That is right.

Q. You said you were a field representative.

A. Yes, I am.

Q. The truth of the matter is you traveled around investigating what you considered racial discrimination; isn't that true?

Mr. Lawson: I object.

Exam. Johnson: Let us hear what his work is. Go ahead. I think that is all right.

The Witness: The committee and my work operate in this fashion: If we receive complaints of discrimination and violation of the President's Executive Order 8802, and they are considered bona fide, we will investigate the complaints. That was part of my duty.

Exam. Johnson: So at that time, you said, you were en route to Atlanta on that particular train.

The Witness: I was enroute to Birmingham via Atlanta.

By Mr. Clark:

Q. So you were an employee of this Fair Labor Com-[fol. 161] mittee that was set up under the order you flamed, traveling to Birmingham to investigate some allegations of racial discrimination; is that right?

A. Yes, that is right.

Mr. Lawson: May I suggest if we have gone into the complete racial allegation—regarding what?

Mr. Clark: Tell us about it. Then I will be delighted for you to tell us what you were going to tell us about was.

Mr. Lawson: Was it industry, education, or what?

The Witness: War industry.

Mr. Clark: I am perfectly willing. What was the thing you were going to investigate?

Mr. Lawson: He has answered it now.

Mr. Clark: I can pursue it further. What industry?  
 The Witness: War industries in the Birmingham region.

By Mr. Clark:

Q. You did go down and make that investigation?

A. Yes, I did.

Q. That was the kind of work you had been engaged in for we will say a year approximately past?

A. No, since November 3.

Q. Have you continued in that line of work since?

A. Yes, I have.

Q. You are still doing that work?

A. I am.

Q. Do you recall when you entered the diner, which end of the diner did you come in, from the kitchen end or the opposite end?

[fol. 162] A. From the kitchen end.

Q. You referred to the two tables set aside for Negroes as "Jim Crow" tables. Do I understand you mean the table on the right hand side of the aisle and the left hand side of the aisle as you immediately entered the car?

A. That is right.

Q. So when you came into the car, you did not have to walk through the length of the diner to get to this station where you stopped and had some words with the steward?

A. No, I didn't.

Q. You met him immediately as you came in, is that it?

A. That is right.

Q. Whatever transpired, you were right there at the end of the car?

A. That is right.

Q. I understood from your testimony, I want to be clear, what he said to you was said quietly, without any offensiveness of manner and attracted no attention?

A. No, I don't think it attracted any attention. My appearance may have. I will say the steward was courteous although he seemed irritated, more irritated on the second and last trip.

Q. You must realize all I am trying to bring out is there was no confusion, no attention was attracted to the parley you had with him?

A. No confusion.



[fol. 163] Q. The waiters were serving the people sitting at the various tables?

A. Yes.

Q. Running up and down the aisle, were there waiters?

A. Yes.

Q. How many people would you say could be seated at one time in that diner?

A. That I could not say.

Q. Would you care to estimate?

A. I'd be afraid to estimate. It appeared to me to be a normal dining car, such as I have seen on trains all over the country. I imagine it would have about the same number of seats most of the dining cars have.

Q. You did see the curtains cutting off these tables which you call "Jim Crow" tables?

A. Yes, I did.

Q. They were not drawn?

A. They were not drawn.

Q. I understand when you say not drawn, each one of the curtains was pushed back against the side of the car?

A. That is right.

Q. When those curtains were drawn, they would cut off the table from the table next to it?

A. Presumably.

Q. One from the other side would be drawn and cut off [fol. 164] that table from the one next to it?

A. Presumably.

Q. When you say Presumably, you mean that is the way it looked. What do you mean by that?

A. That is the way it appeared it would happen, but at no time I was standing there—

Q. They were not drawn?

A. That is right.

Q. From the construction of the car I take it you could see that aisle. What would happen if they had been pulled out to cut the two tables apart? Obviously, you couldn't cut them across the aisle, that would impede the progress.

A. That is correct. I couldn't speculate.

Q. Could you see how they could serve the other tables from the kitchen if they cut off the aisles?

A. I wouldn't want to say.

Q. You don't know how that would be?

A. No.

Q. All you can complain of the curtains, they were back against the side of the cars?

A. That is right.

Q. In your conversations to the dining car steward didn't you somewhat demur to having the curtains drawn at all? What did you say to him about it?

A. I didn't say anything to him about drawing the curtains.

[fol. 165] Q. How come in your complaint you refer to drawing the curtains—

A. I beg your pardon, I said at the time, when the dining car steward stated he couldn't serve me, I said, "Well it's very obvious that you can", or in words to that effect, "because you have the curtains there for that purpose". That I recall was my only reference to the curtains, directly to the dining car steward.

Q. The Pullman car you were in, was that crowded?

A. The Pullman car.

Q. Do you remember?

A. Frankly, I don't remember whether all the berths were taken or not.

Q. That was the car you traveled in the entire distance?

A. All the way.

Q. You said you were unable to get any food on this trip. That is a broad statement. Let's check into it a little. You left Washington you said about two o'clock?

A. Yes.

Q. You had no lunch on the train, did you have your lunch before you got aboard?

A. I don't recall.

Q. You don't remember whether you had lunch that day?

A. I don't recall.

Q. The next thing that would happen would be the dinner [fol. 166] hour, that is the time you talk about, 5:25, 7:00 o'clock, and 7:30?

A. That is right.

Q. From then the diner was taken off at Greensboro?

A. That is right.

Q. From about 9:00 o'clock, you say?

A. That is right.

Q. Then you got back on the train after observing the diner being taken off, continued your journey on to Atlanta.

A. I did.

Q. The train got in about six o'clock next morning?

A. I believe that time.

Q. There had been no other occasion for a meal between the time you left Greensboro and the time you got off that train in Atlanta, isn't that true? You wouldn't expect breakfast at six o'clock, would you?

A. No I don't expect breakfast. There is no reason why I couldn't have eaten if I had the opportunity any time after 9:00 o'clock that evening.

Q. Did you expect a little midnight snack or something?

A. I probably would have been very receptive to it if I could have gotten it.

Q. Are you accustomed in your daily life to partake of mid-night supper after having three meals a day?

A. I don't see where that is particularly—

Q. Answer the question.

[fol. 167] A. Now and then I might eat late at night, yes.

Q. When you went on to Birmingham you had an opportunity, I take it, to supply your breakfast wants either at Atlanta or enroute?

A. Yes.

Q. That is not in the picture—

A. Well, just a minute. In Atlanta I merely changed trains right there in the station to Birmingham, I didn't arrive into Birmingham until 12:00 o'clock that day.

Q. Which would be after the breakfast hour?

A. Yes.

Q. Your complaint deals with Washington to Atlanta, you appreciate that.

A. True.

Q. I wanted to make it perfectly clear that from the time that the diner was taken off, normally there is no occasion for a passenger to be eating another meal between 9:00 o'clock and 6:00 o'clock the next morning, you will agree with me on that?

A. I don't know whether I agree on that at all, Counsel, I have traveled on many trains where you could at least get sandwiches or something of the sort way up until a late hour at night.

Q. In your conversation with Lieutenant Farrell, did you tell him where you were going?

A. No, I didn't. I don't recall.

[fol. 168] Q. Did you tell him where you got on the train?

A. I don't recall.

Q. You don't recall having given him that information?

A. No.

Mr. Clark: I think that is all.

By Exam. Johnson:

Q. Mr. Henderson, one or two points, when you came back the second time, or the second trip, did the dining car steward make any excuse for not calling you, I believe you stated he would call you when the table was available?

A. He made no excuse whatsoever.

By Exam. Johnson:

Q. I believe you made the statement when you came back the second time or else while you were standing there waiting that some of the white diners, white people, got up and others were seated?

A. Yes.

Q. Which trip was that?

A. That was the second trip.

Q. That was the second trip at 7:00 o'clock?

A. In that, Mr. Examiner, I am referring to the two so-called "Jim Crow" tables. During the fifteen minutes I stood there on my first trip persons did come into the dining car and were seated at other tables. It is true they were also seated—

Q. Was there any time when either table was entirely [fol. 169] vacant.

A. Not while I was there.

Exam. Johnson: I think that is all at present.

Mr. Lawson: May I clear up one or two points?

Exam. Johnson: Do you have any other examination?

Mr. Clark: No.

Exam. Johnson: You're through with this witness?

Mr. Clark: Yes.

Redirect examination.

By Mr. Lawson:

Q. When you said you didn't get any food on this trip you meant, did you not, you had no chance to get any food on this diner?



A. Correct.

Q. Because of the refusal of the dining car steward to serve you in the diner?

A. That is right.

Q. With respect to the so called "Jim Crow" tables, they are not only near the end of the diner but they are right in the corner near the kitchen, aren't they?

A. Yes.

Q. With respect to your employment, you don't go around stirring up racial conflict, do you?

A. No.

Q. Your job is to investigate unfair practices in war industries, is that correct?

[fol. 170] Mr. Clark: I think the examination is a little leading.

Mr. Lawson: That last question might have been. I withdraw it.

By Mr. Lawson:

Q. Specifically, what is your employment?

A. Mr. Counsel, I am a field representative of the President's field committee on employment practices which was created by the President's Executive Order created June 1941.

Mr. Clark: It is an Executive Order, Mr. Examiner. If you wish it in we will be very glad to make a note of it.

Mr. Lawson: There is no use to keep on repeating.

The Witness: I would like to make very clear, however, the Order has absolutely nothing to do with dining car facilities so far as I know. At least at that time that was the farthest from my mind. When I went into, if you will permit, when I went into the dining car I had no other thought in my mind except being seated and served. I felt that I should have been served in the dining car, because there were vacancies, that there were not only seats at other tables, there were also seats at these two tables behind the drawn curtains. That is the basis of my complaint. I would like to make it very plain since Counsel has suggested, that there is positively and absolutely no connection between my employment and the incident which occurred on this trip, or my bringing this complaint before the Interstate Commerce Commission.

By Mr. Lawson:

Q: You say there was no confusion during any of the conversations between you and Mr. Farrell.

A. Yes.

Q. During any of your conversations with him, how close would you say there was another person, waiter or passenger, if you remember?

A. There were waiters going back and forth. Of course, the kitchen was right there. They were busying themselves doing work. No doubt it is possible, in passing, persons could have heard the conversations between Mr. Farrell and I. But no one seemed to be paying particular attention to what was said although I could see that persons in other parts of the car were certainly interested in my standing there.

Q. In his refusal to serve you, is that what you mean?

A. Yes.

Q. You were damaged were you not? Did you suffer damage?

A. I did.

Mr. Clark: Now—

Mr. Lawson: We have right to prove damage.

Mr. Clark: Prove the facts. Let the Commission determine.

Mr. Lawson: That is right.

By Mr. Lawson:

Q. You don't remember whether you had lunch before you got on the train on May 17 or not?

A. No, if anything, I don't believe I did. I remember I was very hungry, Mr. Counsel, when I first went into the dining car. In fact 5:25 is little prior to my normal eating hour during the day. It occurred just after the first call for [fol. 172] dinner, and I did go into the dining car.

Q. Tell us what damages you suffered?

A. Oh, I was hungry. I felt very inconvenienced and somewhat ill the next morning.

Q. Were you embarrassed?

A. I was very seriously embarrassed.

Q. In what way?

A. I was embarrassed before the patrons whom I am sure observed my predicament. And I was embarrassed before

the servants on the car, and my own feelings were very seriously——

Q. When he refused to serve you, when you saw white people getting up, being seated in the "Jim Crow" cars, when he suggested to you you'd have to sit by the curtain, you suffered personal embarrassment and inconvenience to a great extent, did you not?

A. Absolutely.

Q. One final question. Do you wish to be bound by the exact time of your visit to these cars?

Mr. Clark: That is not a proper question, if he is testifying to facts he is bound by them, asking a man questions, then being bound by his answers. I object to that type of examination.

Mr. Lawson: Surely you wouldn't want us to be held to 5:25. I want it understood that he was merely approximating it.

[fol. 173] Mr. Clark: Counsel may ask his witness anything he wants to about those details. To ask a man what time did you, or about what time, as if you are going to be bound by that, I never heard of such examination.

Mr. Lawson: I am trying to save time merely.

Mr. Clark: We don't want to save time to the expense of the ——

Mr. Lawson: Neither do we.

By Mr. Lawson:

Q. Do you remember exactly what time you went in the diner the first time?

A. (By the Witness): The first time it was exactly 5:25.

Q. The second time?

A. The second time I believe it was about 7:00 o'clock or about five minutes after.

Q. The third time?

A. The third time I believe it was about 7:30.

Mr. Lawson: I think that is all.

By Exam. Johnson:

Q. As I understand it from the testimony this case just applies to the treatment you had in the diner, it has nothing to do outside of that car.

A. No, it has nothing to do outside.

By Exam. Johnson:

Q. You are perfectly satisfied with everything else on the trip.

A. Absolutely.

Exam. Johnson: I think that is all I have.

[fol. 174] Mr. Clark: One question, Mr. Examiner. In view of the redirect examination.

Exam. Johnson: Yes.

Re cross-examination.

By Mr. Clark:

Q. You spoke of the passengers in the diner as perhaps interested in you when you were talking about the steward. Wouldn't a more accurate statement be, they observed rather interested. I was wondering how you could know whether they were interested or whether they were not. Don't you mean they merely observed you?

A. They did observe, of course. It was in the observation, however, you know when a person in being embarrassed and inconvenienced, you feel, it is possible to see the feelings of other persons a little more plainly than you do otherwise. I could see that these people who were looking at me were also keenly interested in my predicament.

Q. They were observant?

A. That is true.

Q. The interest was in your own head, you were the one that was interested, they were observant.

A. They were observant, not hearing any conversations that might have taken place between them it would be impossible for me to say what they said to each other particularly concerning it. But I certainly feel that they took great interest. I insist they took great interest in my predicament.

[fol. 175] Mr. Clark: That clears it up I think.

Redirect examination.

Mr. Lawson:

Q. When a person is observing you, you can tell whether or not that person is interested in you or it by the interest on their face, time they look at you, etc.



A. I certainly do.

Mr. Clark: I still say the examination is decidedly leading.

Mr. Lawson: I am laying down facts for the next question.

Exam. Johnson: Finish it up.

Mr. Lawson:

Q. From these observations you determine by various methods——

Mr. Clark: I object to that.

By Mr. Lawson:

Q. How did you determine——

Mr. Clark: Let him tell how it was done.

Mr. Lawson: I withdraw the question.

By Mr. Lawson:

Q. How did you determine these people were interested in you and these incidents?

A. From the expressions I observed on their faces and the intent gazes we might say, which they directed toward the steward and myself.

Mr. Lawson: That is all.

Mr. Clark: That is all.

Exam. Johnson: You are excused, Mr. Henderson, thank you.

(Witness excused.)

(Recess.)

[fol. 176] By Exam. Johnson: I might say that there is no free copy of the record.

LT. CHESTER M. FARRELL was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Mr. Witness, you have been sworn?

A. Yes.

Q. Will you give your name and present residence to the reporter?

A. Lieutenant Chester N. Farrell, Army Air Forces.

Q. Where are you stationed at the present time, Lt.?

A. I don't believe I can answer that question.

Q. I will withdraw that question. It is a natural one for civilian witnesses.

Exam. Johnson: Yes.

By Mr. Clark:

Q. Have you ever been in the employ of the Southern Railway Company?

A. Yes Sir.

Q. In what capacity?

A. As dining car steward.

Q. How long were you dining car steward?

A. Six years.

Q. Did you hear the testimony of the Complainant in this case just given this morning?

A. I did.

[fol. 177] Q. Were you in charge of the diner on Train 35, of May 17, 1942.

A. I was.

Q. Was that train one of your customary runs?

A. It was.

Q. So daily or every other day, whatever it was, you were in charge of the diner on that train, is that right?

A. Yes sir.

Q. Of course, you had come back to Washington on some other train which is of no moment here.

A. That is correct.

Q. What diner did you have on that date, by number? Do you remember the number of your car?

A. No I couldn't remember that.

Q. Do you recall how many diners you can seat, how many persons you can seat at one time in that car?

A. Thirty-six.

Q. Were the tables all the same on both sides of the aisle or was there any difference?

A. No, Sir. Leaving the kitchen walking facing from the kitchen, I should say on the left side of the dining car, the tables seated four people. On the right side of the dining car they seated two people.

Q. So there were two-seater tables on the right and four-seater tables on the left, aisle between them.

[fol. 178] A. Yes.

Q. Does that extend all through the diner?

A. Yes.

Q. Did you say how many could be seated at one time?

A. Thirty-six.

Q. Was that your regular car?

A. Yes.

Q. Do you recall about what time you left Washington?

A. About 2:00 o'clock.

Q. P.M.?

A. Yes.

Q. When, as best as you can tell us, were the doors open for the serving of dinner on that trip?

A. 5:30, Sir.

Q. P.M.?

A. Yes, Sir.

Q. Was that the normal time of opening, was it later or earlier than usual do you recall?

A. It was the normal time of opening the diner.

Q. You say you recall the complainant testify, do you recall having seen him before in your car?

A. Yes, Sir.

Q. Do you recognize the complainant?

A. Yes, Sir.

Q. Would you mind telling us please, Lt., just when you [fol. 179] first saw him on this particular trip?

A. I was standing near the buffet of the dining car which is also, I might describe it as the linen locker to those familiar with the dining car—

Mr. Clark: Don't talk too fast. I want the reporter to be sure she gets it.

Lt. Farrell: — there was a line of people waiting to be served into the diner. This gentleman made himself conspicuous by the fact he was coming around these people walking past them until he got to the front. I thought he was going through the car. A seat in the dining car was then vacated and he started up to take this seat. I told him that he was not first, that other people had been waiting before he had. In fact, there were people waiting, I explained to him people were waiting that I was to notify in the Pullman cars as soon as I could possibly serve them.

I then suggested to him I could give him better service and faster service if he would let me serve him at his space that he was occupying on the train.

Mr. Lawson: Will you excuse me a minute, I want to ask a question.

Exam. Johnson: About the question?

Mr. Lawson: What about the exclusion of these other witnesses?

Exam. Johnson: Oh no. They are allowed.

[fol. 180] Mr. Lawson: I wanted to make sure.

(Witness): He replied that he did not want to be served in his space. He wanted to be served in the diner. I explained to him that crowded conditions of the dining car, asked him to cooperate with me, let me serve him in his space and he stood there for about three or four minutes, then left. I didn't see him again for some time.

Q. At that time, you have heard of two tables referred to here as "Jim Crow" tables, the first table on the right and the first table on the left at the kitchen end of the car. I should perhaps ask you whether or not there is any distinction made in the seating of passengers in those tables, they have been called "Jim Crow" tables here, tell us about that please.

A. Those tables are used for colored passengers on the train when they are not occupied by white passengers. They are there curtained off, for that privilege alone, to serve a colored passenger.

Q. Are those curtains at all times drawn or describe how those curtains are arranged?

A. No, Sir, those curtains are not drawn at all times. They are only drawn when a colored passenger occupies one of the seats.

Q. The complainant then returns, as I understand, to his space, when did you next see him, if you saw him again?

[fo. 181] A. About one hour later.

Q. About an hour later he came back?

A. Yes.

Q. What happened then, Lt.?

A. I told him conditions in the dining car were about the same, and I called a waiter that was standing—passing me at the time, and told this waiter to serve this gentleman, to take his order and to serve him in his space in the car.



The waiter replied, told him that he would and was ready to take his order which he refused again to be served.

Q. With respect to serving this passenger at the "Jim Crow" tables, you know which two I mean, behind the curtains.

A. Yes.

Q. Did anything transpire between you and the complainant about serving him at those tables?

A. Yes.

Q. What was it?

A. I told him the situation there, when these tables were available to serve him I'd have to seat him behind these curtains and draw the curtains. He questioned whether those curtains should be up there, said he would not be embarrassed or humiliated by sitting behind the curtains.

Q. He refused to be served at the tables we referred to here as the "Jim Crow" tables?

A. Yes.

[fol. 182] Mr. Clark: I use that term as merely description you understand, Mr. Examiner.

By Mr. Clark:

Q. Tell me something Lt., further on that account to advise us. Did the passenger at the end of this second conversation return to his seat in the Pullman car?

A. As far as I know, he left the diner.

Q. He left the diner?

A. Yes.

Q. He came in from the kitchen end on those two trips?

A. Yes, sir.

Q. Two visits to the diner?

A. Yes.

Q. Did he return a third time?

A. Not to my knowledge.

Q. As far as you can recall he only made two trips into the diner?

A. Yes.

Q. Not three?

A. Yes, sir.

Q. Tell us something please about the way passengers come into the diner to be served. What I have in mind is, is this, do they come in regularly, one by one, or do they

come in by groups, or do they come in surging in on you at one time, then there is a gap, give us some idea how your passengers flow in normally in your diner?

[fol. 183] A. Passengers come in mostly in groups. In this particular run as I recall it, however, that is the way they came in, in groups.

Q. You opened you say about 5:30, you had a number apparently that came in, is that correct?

A. Yes, sir.

Q. Then you recall this diner is taken off somewhere enroute. Where is that?

A. Greensboro.

Q. What hour?

A. Approximately nine o'clock.

Q. Is that the regular time for that train to be about Greensboro?

A. Yes, sir.

Q. On this trip I take it your car was taken off there?

A. Yes, sir.

Q. When the train reaches Greensboro obviously your passengers in your car must have finished their meals if they continue, get back in their space to finish their journey, in that case what steps do you take to see that your passengers have time to be fed, how are you governed by that knowing how people come into your car.

A. You mean, excuse me if I understand—

Q. Let me make it clear. Obviously you can't serve a man in five minutes a full course dinner. You have to be [fol. 184] guided by some considerations in cutting off serving people so they can get through by the time you take your car off at Greensboro.

A. Yes, sir.

Q. I want you to tell us how that works?

A. A passenger coming to the dining car say approximately 8:30, I'd tell him that the diner was going to be taken off, if the train was on time, or assuming that, at 9:00. Then he'd have to order accordingly, I'd tell him the length of time he had to eat.

Q. In estimating the time that it takes for a passenger to eat a normal dinner on your car, is there any absolute set regularity among passengers in the time they take to consume their meals.

A. No, sir.

Q. Would the nature of their order have any bearing on the time that would be consumed?

A. Yes, sir.

Q. Give me an example of something that might be slow or something that might be long in getting up the order?

A. For instance, if a passenger coming into the dining car ordered roast beef which was already prepared he could naturally get that faster than he could get an order of lamb chops or steak which takes approximately twenty or twenty-five minutes to prepare properly.

Q. The kind of order put out affects the amount of time it takes to serve a diner.

[fol. 185] Q. Would the fact the passengers come in in bunches rather than come in evenly affect the time consumed?

A. Yes.

Q. I believe you recognized and told me there was a difference between persons themselves as to the speed with which they consumed their food?

A. Yes, that is true of most of us.

Q. Have you on your run had occasion where passengers had not finished their meal by the time you were cut off at Greensboro?

A. Yes.

Q. What do you do in a case of that kind?

A. In a case of that kind, we have made it a policy to void their check.

Q. In other words, if they don't finish their meal, they just get up and go back to their space?

A. Yes.

Q. Do you recall whether or not on this particular run, anything of that kind happened?

A. I don't recall voiding any checks, but I do recall there were a lot of passengers not served.

Q. Is it a frequent occurrence you might have a little rush at the start when you first open your car for din-er, they would be fed, and there will be a hiatus, then have a few people, then there will be a crowd toward the latter part of the time?

[fol. 186] A. Yes, very frequently.

Q. That is the result, I take it, of just the time the people come into the diner?

A. Yes.

Q. Is there anyway you can make them come in in any regular stream?

A. No, sir.

Q. Tell me, with respect to seating passengers, how do you go about seating them at your several tables?

A. Well, it is customary to try to seat them where the space was available. Of course, you cannot always make a person sit just where you want him to sit. Lots of cases where I offered them a seat in one part of the dining car, she would say, "Oh, I would rather sit over here," and sit in the other place in the car.

Q. What effort do you make to distribute and seat them. How do you go about that as a practical matter?

A. Well, the way the custom of that was according to the waiting for the next persons as far as that is concerned. If I may describe it this way: The first person coming into the dining car would be seated at Number 1 station, Number 1 waiter, the next at Number 2 station, the next at Number 3 station, until it got so it didn't make any difference where you seated them.

[fol. 187] Q. As your passengers come in, you distribute them through your car among your waiters which partly enables the waiters to give them prompter service?

A. Yes.

Q. That would seem to follow, I take it, the almost obvious fact that if you put them all at one table, you would have three or four of your waiters doing nothing.

A. Yes.

Q. So you try to distribute them?

Mr. Lawson: A little leading there.

Mr. Clark: Thank you. I was trying to clear that up from his testimony.

The Witness: The main idea is to seat them where they can be better served, to give them the best service.

By Mr. Clark:

Q. Do you recall whether or not there is any provision made at Greensboro for passengers to get anything to eat, aside from, of course, the diner?

Mr. Lawson: I object to that question for the reason our complaint is based on this diner, not on the restaurant or any other facility.

Exam. Johnson: Let's see. This might be in the diner. I don't know.

Mr. Clark: No, I don't mean in the diner. I mean aside from the diner, if there are any facilities at Greensboro where one can get something to eat.

[fol. 188] The Witness: Yes, I can get sandwiches and coffee at Greensboro.

Exam. Johnson: Would that apply to passengers going on?

Mr. Clark: That is what I am asking him about.

Mr. Lawson: That is what I am objecting to. I objected to the first question. I would like to have it deleted.

Exam. Johnson: Let's see what Mr. Farrell says about this question whether this would apply to persons going through Greensboro as in the case of Mr. Henderson. I want to see whether it is connected up with this case.

The Witness: For instance, if we were going down here at night, the diner was crowded and we couldn't get in to have something to eat, the diner was cut off at Greensboro, we could go outside and get sandwiches and coffee. They sold them right on the platform.

Exam. Johnson: I think that is all right. As I remember, Mr. Henderson claims he did not get anything at Greensboro. I think that question is really in the case.

Mr. Lawson: I want you to understand my objection has to do only with the diner.

Exam. Johnson: That is right.

Mr. Lawson: Whether or not Mr. Henderson could have gotten off the train to a restaurant is irrelevant to this case. That is my objection, because, you see, that would mean that the railway company would be taking advantage of its own wrong.

(Discussion off the record.)

[fol. 189] Exam. Johnson: Proceed.

By Mr. Clark:

Q. The complainant has testified here that he observed your diner being cut off at Greensboro?

A. Yes.

Q. I am asking you whether or not, aside from the diner, if there was any facility or any way that a passenger, this



complainant, for example, could have gotten anything to eat at Greensboro while train 35 was standing at that station?

A. Yes, they sell sandwiches and coffee there on the platform at Greensboro.

Q. The station platform?

A. Yes.

Q. Where the train was?

A. Yes.

Q. Does that occur from time to time or with any degree of regularity or what that the passengers who don't get fed in the diner are able to meet their needs by that method on the platform?

A. Yes.

Q. Does that happen?

A. Yes; it happens frequently.

Q. While you have been in charge of this car?

A. Yes.

Q. In leaving at 2:00 o'clock, was your car open for lunch?

A. Yes.

[fol. 190] Q. Do you recall on that trip whether or not you saw the complainant in your car for luncheon?

A. No, sir.

Q. He didn't present himself?

A. No, sir, he didn't, to my knowledge.

Q. Obviously from your title, you are no longer in the dining car service. You are now in the armed services?

A. Yes.

Q. The complainant has made reference in his testimony, charged in his complaint he was humiliated. I want to ask you to describe, tell us in what tone of voice and in what manner, how your conversations with him were conducted, as bearing on that. Will you please explain that, as best you can?

A. I talked with him at all times with the greatest of courtesy that I possessed. I even asked him to even help me; to cooperate with me, and let me take care of him, serve him.

Q. I believe he said you mentioned to him the fact that under the State laws you could not serve him at these tables he wishes to be served at?

A. I did.

Q. That happened?

A. Yes.

Q. Was there any confusion or commotion to attract attention in the colloquies you may have had with him?  
[fol. 191] A. No, sir.

Q. Mr. Farrell, do you have many diners on that run or any other that you may have run— First, take this particular run. Do you have many diners coming in for service who are colored persons?

A. Not very many.

Q. In this day and time when you were last serving, has there been any increase in the passenger traffic and persons using the dining car facilities?

A. Yes.

Q. Was that increase, in the main, in the white passengers or was it in the colored passengers?

A. White passengers.

Q. I appreciate that it is a rather difficult question I am going to ask you. How would you describe the relative number of colored persons as related to the white persons that are served on that run? Is there any way you can tell us any percentage, give us any idea? I don't know, you may have some idea?

A. That are served in the diner?

Q. Yes.

Mr. Lawson: I don't believe I am quite clear on the question.

Mr. Clark: I am trying to determine what the percentage of colored passengers that seek dining car service is as compared with the total service, is it a small, insignificant, negligible amount?

The Witness: I would say a thousand to one.

By Mr. Clark:

Q. In other words, it is relatively a quite small proportion of colored passengers who seek dining car service?

A. Yes.

Q. Is that true only of train 35 that you operated or that fairly representative of other trains on which you have dining car service?

A. That was true of all trains that I have ever worked on.

Q. It is relatively small?

A. Yes.

Q. I want to ask you this. Despite the fact that the number

ber of colored persons seeking dining car service on this train and others you have operated, is small, I want to ask you whether or not in the cars you had charge of, whether you have or have not served them as they presented themselves for service?

A. I will have to ask you to say that again, please, sir.

Q. Bearing in mind, although you told me you had a relatively small number of colored persons seeking service, have you or have you not served that relatively small number as they have come in?

A. Yes.

Q. You have served them?

A. Yes.

[fol. 193] Q. It would be appropriate in this case for you to tell us how you served the colored passengers? The reason that is important, Mr. Examiner, there is a cease and desist order asked for. I make the question a little broader than applying to this one complainant and for that purpose. That is the purpose of my question.

How do you serve your colored passengers? What do you do? Tell me about the tables, your curtains as a general proposition.

A. The usual manner of serving the colored passengers which come into the dining car, if these tables set aside for colored passengers were available, we would seat them at that table.

Q. At once when they presented themselves?

A. Yes. Then if these tables happened to be occupied, it was our custom to offer them service in the space that they may be occupying on that train.

Q. Their Pullman space, for example?

A. Yes.

Q. Would you seat a colored passenger at one of your four-seated tables, in, say, the body of the car, some table other than the so-called Jim Crow tables, if there were one or two white passengers sitting at that table?

A. I would not.

Q. You set aside these tables for your colored passengers?

[fol. 194] A. Yes.

Q. As I understood you, you would only use those for whites when the other part of your car was being—

A. Filled.

Q. Being occupied by white passengers?

A. That is right.

Q. When a passenger comes in to the car, do you make any effort to preserve and reserve these Jim Crow tables for your colored passengers or do your passengers always seat themselves where you would like to have them seated? What happens?

A. We would always seat the people at the other end of the car, other than these tables, first. When those tables are occupied, then we would avail ourselves to use them.

Q. If a white passenger comes in from the kitchen end of the car, it is perfectly possible, I take it, you might be down at the opposite end of the car, is that true?

A. Yes.

Q. In such a situation, is it true such passenger will seat himself at the Jim Crow table? After he once gets seated, what do you do about it?

A. Very often a passenger will come into the dining car and take the first seat to sit down. I never had the occasion to ask him to move for my convenience or anyone else's.

Q. After he first seats himself there, you wouldn't ask him [fol. 195] to move, I take it?

A. That is right.

Q. In this particular instance, the testimony is there were white persons sitting at your so-called Jim Crow tables.

A. There were.

Q. Do you know under what conditions they were seated there, how they happened to get there?

A. Mainly, as I recall it, the rest of the seats in the dining car were occupied. It could happen. If the witness is present—

Exam. Johnson: I wondered if you had the additional information.

Mr. Clark: I thought he might be sent out of the country. I couldn't get him.

Mr. Lawson: Obviously that is part of the record. You can't take depositions under the rules properly then and have an attorney come in and just delete it if for no other reason than the question of impeachment.

(Discussion off the record.)

Cross-examination.

By Mr. Lawson:

Q. Lieutenant Farrell, this train 35 left here about 2:00 o'clock?

A. Just about.

Q. What time did lunch start on your diner?

A. Immediately.

[fol. 196] Q. Passengers were eating when the train pulled out?

A. Yes, sir.

Q. What time did lunch end?

A. I could not tell you exactly what time it ended. If you want it approximately, I would say it would be around three-thirty, something like that.

Q. As a matter of fact, this was a Sunday, was it not?

A. As I recollect, it was.

Q. Weren't passengers served right straight through, lunch and dinner?

A. No, we always clear the dining car to clear it up.

Q. What time did you clear the diner?

A. I would say approximately three-thirty.

Q. You opened it at five-thirty?

A. Five-thirty.

Q. How do you know you opened it at five-thirty on that day?

A. I am approximating everything I say, when I say five-thirty, I mean five-thirty approximately.

Q. Your testimony is you are not sure it was five-thirty?

A. It may have been five twenty-four or five twenty-six.

Q. So it is possible the diner was open at five twenty-five?

A. That is right.

Q. You said this complainant walked by the front and walked on into the diner?

A. The line of passengers.

Q. Yes, I believe you said that. What time did this line of [fol. 197] passengers get there? When you opened the door at approximately five-thirty were they standing there?

A. Yes.

Q. All lined up standing there waiting?

A. Waiting to be served.

Q. At five-thirty?

A. That is my recollection.



Q. When you opened the dining car door, they all rushed in, including Mr. Henderson?

A. No, I didn't say including Mr. Henderson.

Q. What did Mr. Henderson do?

A. The dining car was filled when I first observed Mr. Henderson.

Q. He was behind the line then?

A. He was coming up the aisle.

Q. Didn't you testify on *direction* examination that he walked past this line?

A. I did.

Q. How could he walk past the line if when you first saw him the diner was full?

A. That didn't have anything to do with the diner being filled.

Q. The diner was filled, there was still a long line?

A. Surely.

Q. Where was Mr. Henderson when you first saw him? [fol. 198] A. I saw him go up the aisle. Not in the diner, you understand. Next to the kitchen, from the Pullman end of the car.

Q. With respect to the dining car, he was coming from the kitchen end?

A. Yes, sir.

Q. That is the kitchen end, then there is a narrow aisle along the side?

A. That is correct.

Q. In that aisle there was this line of people?

A. That is correct.

Q. Where was Mr. Henderson, at the dining or end of that line?

A. When I first observed him he was about the middle of it.

Q. How did you happen to be outside the diner looking down that aisle?

A. It is customary for me to stand there. It is usually where I took my position in the dining car after it was filled.

Q. With a crowded diner you were standing out in the aisle looking down the aisle?

A. Yes. I stand there mainly for one reason.

Q. Why?

A. To keep the diners from causing a congestion, the

waiters passing from the kitchen. Naturally on this occasion they were in the way. I was standing there to keep [fol. 199] the food from being spilled upon them, anything like that.

Q. People in the aisle were in the way of the waiters?

A. Yes, no question about that.

Q. No question?

A. That is right.

Q. What were you people doing down the aisle?

A. I didn't say they were down the aisle.

Q. Not quite so fast. Mr. Henderson was in the middle of this line of people in the aisle?

A. I say Mr. Henderson.

Q. You were standing in such position as you could see down this aisle?

A. Yes, sir.

Q. As you come up the aisle by the side of the kitchen, isn't there a turn from that aisle into the little pantry?

A. Yes.

Q. Isn't there another turn to the left into the diner?

A. That is correct.

Q. Where were you standing?

A. In front of the linen locker. You know where that is.

Q. I believe I do. So you could see down the aisle?

A. Yes.

Q. As you were standing there, it was your testimony, the dining car was full of people?

A. Yes.

[fol. 200] Q. Every seat taken?

A. To my best knowledge it was at that particular time. They wouldn't have been standing there if there were any vacant seats.

Q. That was as soon as you opened?

A. Yes, approximately.

Q. Who was arranging the seating of these people as they got into the diner?

A. Those conditions, lots of days, used to be customary for the steward to seat them. When they come in like that, they come in and sit down.

Q. Then Mr. Henderson was in the middle of this aisle, this line of people, got out of line, come up to you?

A. To my best knowledge. I never saw him in the line. I saw him passing the line.

Q. You saw him in the middle, passing?

A. Walking toward the diner.

Q. He walked up to you, what did he first say?

A. That I could not recall, what he first said.

Q. What did you first say to him?

A. I asked him if he wanted to be served.

Q. Did you ask him what he wanted?

A. I asked him if he wanted to be served.

Q. What did he say?

A. He said, "Yes".

[fol. 201] Q. What did you say?

A. I said, "Well, you see we are crowded here, no seats available, but I will serve you in your space that you are occupying."

Q. You told him that the first time, in the first conversation?

A. That is correct.

Q. As I recall you testified on direct examination that he walked by these people and on into the diner or started into the diner?

A. That is right.

Q. Did you stop him?

A. Did I stop him?

Q. Yes.

A. Stopped to talk to him, sure.

Q. Did you stop him, did you tell him he couldn't go in the diner?

A. No, I didn't tell him.

Q. You told him he couldn't be served in the diner, but could be served in his space?

A. There was no space available for him to be served in the diner.

Q. Did you tell him he couldn't be served in the diner at that time?

A. He could see that.

[fol. 202] Q. You are not responsible. Answer if you care to, yes or no.

A. I didn't tell him he could not be served in the diner, no.

Q. But you did tell him he could be served in his space?

A. I did tell him that.

Q. You did say on direct you asked him to cooperate with you?

A. That is right.

Q. He was the only colored passenger you saw?

A. In the diner.

Q. Anywhere in the diner?

A. That is right.

Q. Did it occur to you you might have cooperated with him, having in mind these Jim Crow cars, to serve him and get rid of him then you would be free with your white passengers?

A. I wouldn't exactly answer that question by saying serving him and getting rid of him. I would have liked to have served him to both of our advantages, where he could get his meal.

Q. You are not answering the question. Did it occur to you you might have in that exigency have gotten rid of him, served him and let him go back quickly, by putting him at the Jim Crow seat?

A. If it was available, I would have seated him immediately. I would have been glad to have done it.

Q. You didn't?

[fol. 203] A. It wasn't there. It was occupied.

Q. You say when this white passenger or these white passengers sit down in these Jim Crow seats of their own volition, you don't ask them to move?

A. No.

Q. Is it a fact, then, if the Jim Crow seats are taken, or any one, at each table is taken and the colored passenger does not care to be served in his space, there is no provision for them, is that right? There is no provision for him to be served in the dining car at that particular time when that space he is supposed to be, or I say would be curtailed off under existing conditions, was occupied?

A. That is right.

Q. If he doesn't care to be served in his Pullman there is no provision made, is there?

A. Well, under those circumstances, if he didn't care to be served in his Pullman, we naturally assume he didn't care to eat.

Q. With respect to these curtains, did he say to you that he did not care to eat behind this curtain, or words to that effect?

A. He didn't exactly say he didn't care to eat behind these curtains. He questioned the fact whether I could curtain it off after he did sit down there.

Q. Was there any talk about instructions, orders, regula-  
[fol. 204] tions under which you were working?

A. I don't recall ever telling him about any instructions or anything of that kind.

Q. Are you instructed with regard to colored passengers?

A. Certainly.

Q. Are those instructions oral or written?

A. Both.

Q. What are the oral instructions?

A. The oral instructions were to use—

Q. First, excuse me, will you, Lieutenant, from whom do you get those instructions?

A. Superintendant of dining cars.

Q. What are those oral instructions?

A. Now, listen, the oral instructions are from, could be from the agent, could be from the inspector.

Q. You get them from employees or servants or agents of the company, your supervisors?

A. That is right.

Q. What are those instructions?

A. To always serve the colored passenger to the best, to his and our best advantage.

Q. Is that all?

A. That is all.

Q. That is the only oral instructions?

A. That is all I ever received.

[fol. 205] Q. Have you been instructed to reserve these tables, these two end tables for colored people?

A. Yes, I have been instructed to reserve it for only a certain length of time. If there is no colored passengers occupying them, then to turn them over to white passengers.

Q. Is that instruction oral or written?

A. As I recall, that instruction was both oral and written.

Q. Will you show me the written instruction?

A. I don't have it.

Q. Are you positive or not whether it was written or published?

A. To my best knowledge. I wouldn't be positive. To my knowledge it was written.

Q. I don't quite understand, to your knowledge it was. Would you say it was or was not?

A. I would say to my knowledge it was.



Mr. Clark: Right on that point. You will excuse me. I may help matters by explaining I intend later to put on a witness to prove the circular of instructions, if you would like to have it read now.

Mr. Lawson: No, I am glad to know. I will reserve. I think it will be more logical to reserve it until that time. If you want to reserve it later.

Mr. Clark: He is not in the room now. He is a witness quite important to the operation of the railroad. I can't have him sit here the whole morning. As I understand it is [fol. 206] Mr. McLain, Assistant Vice-President, Chief Transportation officer. I will have him come down to read this.

Mr. Lawson: Yes. I think it will be proper to do that.

By Mr. Lawson:

Q. The question is there any other instruction, oral instruction?

A. Not to my knowledge.

Q. Under those oral instructions, then, you were required to reserve these colored tables, if white people don't want to use them?

A. I can explain that to you this way. For instance, the tables were vacant, there was a white passenger and a colored passenger standing at the end of the dining car, the colored passenger would be given preference to those tables because it was set off for their use. But in the event there was no colored passenger there, and a white passenger occupied the table, then when the colored passenger came in, we would not seat the colored passenger with the white person.

Q. Suppose the tables were vacant and suppose further that the diner was pretty well crowded, but the vacant tables, the Jim Crow tables were vacant and simultaneously a white and colored passenger came in, which one would you seat first?

A. I think I answered that before when I said if they both came in at the same time or simultaneously, I would seat the colored passenger first.

Q. Suppose there was one white person sitting at the [fol. 207] big table, a four-seated table, and a colored passenger came in, you would not seat him?

A. I would seat him at the other table, the small table.

Q. Suppose that white passenger was almost finished eating, another white passenger was waiting to take that seat, this negro passenger was waiting, would you serve the white or negro passenger?

A. I don't see how you can determine how anybody is almost finished eating.

Q. Suppose he is eating dessert, you are expecting him to leave shortly, another white passenger came in, you knew he wanted to eat at that table, this colored passenger was waiting, what would you do?

A. You are assuming all the rest of the seats in the dining car are occupied?

Q. I am assuming most of them are.

A. Most of them are, and there was other available space, I would seat the white passenger up in the available seats.

Q. In view of that situation, why wouldn't you ask the white passenger to move from a Jim Crow table once he had sat down there with a negro waiting?

A. I would.

Q. You said while ago you wouldn't.

A. I said I would not? I don't recall that.

Q. Did you on direct examination?

[fol. 208] A. I don't recall that.

Q. If there is a difference, what is the correct answer to that?

A. You are asking me?

Q. Yes.

A. The answer is he asked me if there was a colored passenger waiting and there was other available seats, what, I assume in the dining car, that I would not ask the white passenger to move back and take the other seat? I don't recall saying I wouldn't do that. I did say that in previous testimony that if a passenger coming to the dining, came in and sat down, I would not request him to move, where there was no occasion to ask him to move. I didn't say if there was a colored passenger waiting.

Q. I misunderstood you then.

Suppose white people were seated at the Jim Crow table and there were vacant seats in the body of the car, the diner. Would you seat a negro up there?

A. In the body of the diner?

Q. Yes.

A. No.

Q. So this reservation is not absolute, is it?

A. No, sir, it is not absolute.

At that time it wasn't done. I don't know whether it is now.

Q. I am talking about at that time.

[fol. 209] Exam. Johnson: Lieutenant Farrell, as far as your instructions go, the instructions you receive, the treatment accorded Mr. Henderson was the same as these other colored people that enter your diner?

The Witness: Yes.

By Mr. Lawson:

Q. Lieutenant Farrell, it is the general practice of your company to offer to serve negroes in their space if these reserved tables have white passengers?

A. If they are occupied, yes. It was the policy of the railroad conveyed to me by the railroad to give just as much attention to colored passengers as white passengers. I didn't particularly discriminate. The only thing was that I ever did was to make both parties concerned satisfied.

Q. Did you undertake to satisfy Mr. Henderson in any other way than to offer to serve him in his seat?

A. That was the only way I could.

Q. When he told you—when you told him you would send for him when the situation changed, why didn't you send for him?

A. The situation never changed.

Q. Never changed?

A. No.

Q. At no time was there a vacant seat at the Jim Crow table?

A. There could have been a vacant seat but not a vacant table now.

Q. At all times white passengers were sitting at one or [fol. 210] both of the tables?

A. Yes.

Q. Were there times when there were other vacant seats at other tables?

A. Well, I don't recall whether there was or not. As I recall there was mostly a line of people waiting to sit down. If there was available seats, there would be no occasion for a line of people to be standing up.

Q. If you wanted, as you say you did, to give this service to this colored passenger, wasn't there a time if you really wanted to; when you could have sent the waiter for him and reserved space for him?

A. No.

Q. You couldn't have done that at any time?

A. No, not at any time.

Q. Was there any discussion between you and Mr. Henderson about the laws of the states, Jim Crow laws, which required you or the company to do certain things?

A. Yes.

Q. What was that discussion?

A. I told him we were passing through a state, I said that this is no law of the Southern Railway, it is not discrimination on my part, but they do have in this state a Jim Crow law.

Q. What state were you referring to?

[fol. 211] A. It was in Virginia or North Carolina. I think it was Virginia, when I first saw him.

Q. The second visit, what was the state?

A. It could be Virginia.

Q. It could be Virginia, but was it?

A. I don't remember.

Q. Do you know whether or not the laws of Virginia and North Carolina are the same regarding this situation?

A. Not being a lawyer, I couldn't say.

Q. Is there any instruction from the company as to the law, to you? Does the company advise you or instruct you about the laws of these various states?

A. The company never discriminated between states.

Q. That isn't my question. In your oral or written instructions, does the company undertake to suggest to you what the various laws are?

A. Of the states, no, they don't.

Q. As I understand it, you have the discretion to determine when a colored passenger should be seated, is that right?

A. I have discretion to determine what colored passenger should be seated?

A. If the car is crowded, there are white people at these Jim Crow tables, you think they are going to be there for some time, it is in your power to say to this colored passenger we will serve you in five minutes or whatever in your discretion you can do it?



[fol. 212] A. That is right.

Q. If you had a white passenger eating at the Jim Crow table and he let us say is half through his meal, and another white passenger comes in and a colored passenger comes in, it is within your discretion to determine whether or not you should seat this white passenger in preference to the colored passenger, is it not?

A. That is right.

Q. So that the application of whatever rules or regulations or laws which are in effect in that situation, you had the power to apply, didn't you?

A. I don't know whether I have the power or not. Anything I would do there would be personal.

Q. It is within your discretion, you can do whatever you think is best in that situation?

A. Yes, what I think best.

Q. Under that situation, that policy, you could if you wanted to, see that a colored person never got seated, all you would have to do is say, "Well, this first passenger"——

Mr. Clark: That is a matter of argument.

Mr. Lawson: This is hypothetical. This man is an expert witness and this is a hypothetical question.

Mr. Clark: If it is a hypothetical question, there is no fact on the record on which to base it.

[fol. 213] Mr. Lawson: I can ask a hypothetical question from the expert witness.

Exam. Johnson: Ask the question. Let us see.

Mr. Clark: He is a simple man in charge of a dining car. He is no expert. It is a simple fact. Counsel wants to turn this into a hypothetical question. This is argument. He has a very weak ground in both instances.

Mr. Lawson: I will go along, but I think he has answered the question.

Exam. Johnson: Are there any other questions?

By Mr. Lawson:

Q. You say that this complainant could have gotten service at Greensboro, is that right?

A. He could have, yes.

Q. Do you know whether or not as a matter of fact on this Sunday night this man was selling sandwiches?

A. No, I don't know whether on that night or not. It was customary for him to be there.



Q. Do you know whether or not the colored people can be served in the railway station at Greensboro?

A. That wasn't in the enclosure. That was on the platform. They sell to anybody.

Q. I am talking about another situation. Do you know whether colored passengers can be served inside the restaurant there?

A. That never concerned me.

[fol. 214] Q. You don't know?

A. I don't.

Q. You don't know whether these people were selling sandwiches on this particular night, do you?

A. I didn't see them.

Q. You don't know whether this complainant on May 17 or early morning of the 18th could have gotten other dining car facilities in Greensboro, do you?

A. I can only go by saying that he could, because just the same as I would say that I don't know whether the Willard or Mayflower Hotel are open today. It might be closed up a whole day.

Q. You don't know whether on this particular day he could have gotten food because you say you did not know the man was there selling sandwiches, you don't know, you say, that he could be served in this restaurant?

A. I couldn't say he could have got it. Naturally that would have been a hard question to answer. Greensboro could have sold out of food.

Q. You don't know?

A. I don't know.

Exam. Johnson: How long does the train stand there at the station in Greensboro, this particular train?

The Witness: Usually about fifteen minutes. You see we take the diner off there, move that, then hook the Pullmans [fol. 215] back to the train, which takes approximately fifteen minutes. I have seen it stay longer than that. I have seen it stay—

Exam. Johnson: An average of fifteen minutes?

The Witness: Yes.

By Mr. Lawson:

Q. You don't consider it good service by your company if a passenger is compelled to, interstate passenger is com-

pelled to get off the train, go look for food in Greensboro, do you?

A. I had nothing to do with that at all.

Q. I know you don't. Do you consider that the company, the Southern Railway is rendering good service, if under these circumstances a passenger is forced to get off—

Mr. Clark: That is one of the issues that is here, whether or not adequate and sufficient and equal services and so forth, in this dining car business, is under attack. That is for the Commission to say.

Mr. Lawson: That is why I am asking this question.

Mr. Clark: I don't think so. The witness is testifying as to facts. His opinion as to whether the service is this or that or not is a question for the Commission.

Exam. Johnson: Are there any other questions? All right.

Mr. Lawson: I believe that is all.

Exam. Johnson: Anything on redirect?

Mr. Clark: Yes.

[fol. 216] Redirect examination.

By Mr. Clark:

Q. I am not sure I followed you in response to cross-examination in respect to this discretion; you were talking rather rapidly. I am not sure whether I have it clear. Of course, now, you were the official in charge of the diner, that is clear?

A. Yes.

Q. So far as your being in charge, there is a certain amount of discretion in the handling of passengers, your waiters, the service, and all that. There is no doubt about that, I take it?

A. That is correct.

Q. Undoubtedly you would not be in charge.

A. That is right.

Q. Do I understand there is any discretion bested in you to mix the races, as it were, at the tables in violation of what you told us was a rule and method of the company given you to follow? There is no discretion on you about that, is there?

A. No, sir.

Q. I take it insofar as this discretion is concerned, that has nothing to do with the clear cut statement of how you operated your car?

A. No.

Q. That was a matter of a clear cut statement of fact. There is no discretion one way or another about the details [fol. 217] of handling your passengers and seating them?

A. No discretion about that.

Mr. Lawson: Your instructions were verbal and written as you have testified?

The Witness: Yes.

Mr. Lawson: The application of those instructions would be, certainly the oral ones would be dependent on your discretion, wouldn't it?

The Witness: There would be no interpreting the word "discretion". I wouldn't say there would be any discretion.

Mr. Lawson: You don't mean to say in a crowded situation and in an emergency, you wouldn't do what you think is best under the circumstances, would you?

The Witness: I would do what I thought was best under the circumstances, yes.

Mr. Lawson: That is discretion.

Exam. Johnson: You were through?

Mr. Lawson: Yes.

Exam. Johnson: You are excused.

(Witness excused.)

Mr. Clark: Off record.

(There was a discussion off the record.)

Exam. Johnson: On the record.

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[fol. 218] JOHN WHITE was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Would you give your name and tell us where you live at the present time?

A. John White, 1116 Columbia Road Northwest, Washington, D. C.

Q. Are you in the employ of any railroad?

A. Southern Railroad.

Q. How long have you been in the employ of the Southern Railroad?

A. 28 years.

Q. At this time what capacity, what connection were you employed?

A. Dining car service as a waiter.

Q. How long have you been a dining car waiter?

A. Since I have been there, 28 years.

Q. At this time, do you still run on the diner that operates on train 35 out of Washington?

A. Yes.

Q. The complainant in this case on hearing refers to an incident that occurred on May 17, 1942, that is, last year. The complainant is Elmer W. Henderson that you see here. On that date, I want to know if you remember seeing the complainant here?

A. Yes.

[fol. 219] Q. Do you remember seeing him?

A. Yes.

Q. Where was he?

A. He was standing in front of the buffet in front of the dining car.

Q. In your dining car?

A. Yes.

Q. Would you in your own way, John, just tell us first what tables you served, what your station is, as I believe you technically call it. I want you to tell us about when you first saw him, what happened, when you second saw him, if you did see him a second time, and so forth. Tell us in your own way what you saw and heard about it. I don't mean what you heard from Mr. Farrell, what you may have heard from the complainant, Elmer W. Henderson. Go right ahead.

A. My tables are 1 and 2 tables. The 1 table, No. 1, is the first table on the right, seats two people. No. 2 is a four-seat table on the left.

Q. That is coming from the kitchen end?

A. Coming out of the kitchen end into the dining car. Of course, when I first saw Mr. Henderson, he was standing in front of the buffet. We were busy serving.

Q. Right there, describe the location of the buffet with respect to the aisle and end of the car. Describe that some way.



[fol: 220] A. Well, coming from the kitchen end, it is all to the left, and it is at the door going into the pantry to the right. That is, coming into the dining car.

Q. Is the buffet generally at the end of the aisle, at the kitchen end of the car?

A. Right at the end of the car, just before you enter into the pantry.

Q. Kitchen and pantry on one side the little aisle, round the kitchen end on the other?

A. Yes.

Q. That is the kitchen end?

A. Yes.

Q. When you first saw him, he was standing there. Could you tell us about what time that was, if you know. Go ahead and tell us what happened.

A. I don't know exactly just what time it was. It was shortly after we made the call.

Q. Made the call for dinner?

A. We usually made the call around 5:30.

Q. That is the call for the dinner meal?

A. That is right.

Q. Go ahead. You saw him there. Did he approach the steward?

A. I saw him there talking to the steward. I didn't pay any attention as to what he was talking about or nothing. I happened to see him standing there.

[fol. 221] Q. Was there any commotion incident to this conversation?

Mr. Lawson: I think that is a little too leading. The witness can testify. Mr. Clark is telling him what to say, more or less.

Mr. Clark: I am certainly sorry. I asked him if there was any commotion. I don't think that was leading. I will withdraw the question.

By Mr. Clark:

Q. What happened when you saw him there talking with the steward?

Mr. Lawson: That is all right.

The Witness: I didn't see anything happen.



By Mr. Clark:

Q. Nothing happened. They were just talking. What did the passengers do?

Mr. Lawson: O object. He said he saw nothing and nothing happened. I don't think he ought to keep leading him. I object.

Mr. Clark: I said nothing happened, what did the passengers do?

Mr. Lawson: That something happened?

Mr. Clark: Certainly there is nothing leading when I asked him what the passengers did.

Mr. Lawson: He answered he saw nothing, heard nothing.

Mr. Clark: The passengers would be standing there yet under your theory.

Exam. Johnson: Tell us what the situation there was.

[fol. 222] The Witness: The only thing I know when we opened the dining car, shortly after we opened it, I saw Mr. Henderson standing there. He and Mr. Farrell were talking. Just what the conversation was, I don't know. Of course, I was busy working.

Mr. Clark: We have still got them talking there. We can't leave them there forever. What was the next step?

Mr. Lawson: I object. I like to be liberal. Mr. Clark is just playing with us here. He said he didn't see anything, then he says what happened next.

Exam. Johnson: I think, Mr. White, you meant you didn't see anything out of the ordinary.

The Witness: What you mean what happened? You know I was working there. Nothing happened a I know, just people coming there standing up, you know. Just as I was going to tell you, Mr. Henderson came there, stood up for a few minutes, he and Mr. Farrell were talking, after which I didn't see him, he was gone.

By Mr. Clark:

Q. Then did you see him again?

A. Later on, he came back. I don't know whether I said to him the first time he was there or the second time, would you like to be served in the car, and he said, no, thank you. That is all.

Q. You said that to the complainant?

**Exam. Johnson:** You said in his seat?

**The Witness:** I said, would you like to be served back in his car, I didn't say Pullman seat or anything. I said, in his car.

[fol. 223] **By Mr. Clark:**

**Q.** What did he say to that?

**A.** He said, no, thank you.

**Q.** He did not wish to be served. That is twice you recall seeing him. Do you recall seeing him an additional time?

**A.** Those are the only times I saw him.

**Q.** You recall twice?

**A.** That is right.

**Q.** There at the time you first saw the passenger, would you tell us whether or not your seats, the tables that you serve, 1 and 2, was anybody at those tables?

**A.** Yes, there was.

**Q.** Were they white passengers?

**A.** Yes.

**Q.** The second time he came in, do you recall whether anyone was occupying those tables?

**A.** They were.

**Q.** What was the general situation, if you know, with respect to the number of diners in the body of the car? Was it empty? Full? Or how would you describe it?

**A.** Well, I imagine it was just coming and going. The diner was, you know, continuously filled up from the time we started until we quit serving. You know the people are coming and going, you see.

**Q.** You said you had a pretty good crowd of people as you started out and then they were coming and going throughout the trip, is that it?

[fol. 224] **A.** I don't know I exactly follow you.

**Q.** Could you tell us how the passengers came in, who wanted to be fed, was it a good crowd or how would you describe it?

**A.** We seemed to be pretty rushed at the start, you know, then people just coming and going.

**Mr. Clark:** I believe the 17th, the calendar will show that was on Sunday. Am I right about that? Does anybody recall?

**Mr. Henderson:** It was Sunday.

By Mr. Clark:

Q. I want to ask you, John, does Sunday or week end make any difference in the crowd or number of persons that have to be fed in your diner?

A. Yes.

Q. More or less on those days?

A. Usually more.

Q. Do you recall whether or not when your car was cut off at Greensboro all your passengers had been fed who wished service that day?

A. I don't know.

Q. You don't remember?

A. No.

Q. Is it a fact that sometimes you are not able to serve all who seek to be served?

A. Yes.

Q. You served the two stations that have been referred to here as "Jim Crow" tables, did you? They are the ones that are cut off or could be cut off by a curtain?

A. Yes.

[fol. 225] Q. Describe to us how that curtain when it is applied pulls out, how it works? Could you give us a description of that so the Examiner will understand?

A. Exactly the same as that curtain hanging there, that is drawn, it is just like that, that aisle for you to walk through.

Q. Not so fast, now we will let you describe it. There is a window here in the room, there are curtains extending out some inches, there is a space or gap between the two curtains?

A. That is right.

Q. Do I understand these two side pieces of curtains are representative of the curtains that would hang between your tables and the ones next to you?

A. Yes.

Q. But would not extend across the aisle?

A. Yes.

Q. In other words, the curtain is just straight across like that, if I may describe it. Straight across, across the car, not longitudinally, not the length of the car, but across the car, is that what it is?

A. Yes, that is right.

Q. Do you remember on this particular occasion, if you do, whether the curtain was drawn or whether it was back against the side of the car?

A. Back against the side of the car.

Q. Had not been drawn?

A. If it was, I don't remember.

[fol. 226] Exam. Johnson: Is that curtain in two parts?

The Witness: Yes.

Exam. Johnson: Like a window pair of curtains?

The Witness: Yes.

Exam. Johnson: Drawn together in the center?

The Witness: Yes.

Mr. Clark: As I understand the witness, it doesn't cross the aisle to the middle of the car.

Mr. Lawson: Just crosses the tables.

The Witness: Crosses the tables. They would be, when you pushed them back, against the wall, they are open. When they are drawn like that, they are for the colored passengers.

Mr. Clark: It doesn't surround the tables?

The Witness: No, just up to the aisle. You have got to have a passage way there. You draw the curtains up to the aisle just the length of the table.

Exam. Johnson: It separates the two tables?

The Witness: Yes.

By Mr. Clark:

Q. In your experience and service, have you had occasion to serve colored passengers in your car and at your table?

A. Yes.

Q. Do you have very many of them to be served?

A. Yes, a good many now.

Q. Nowadays you have quite a good many?

A. Yes.

[fol. 227] Q. This particular trip, did you have more than one passenger, complainant in this case, or did you have more colored passengers, or do you remember that date?

A. He is the onliest passenger I seed.

Q. Only one you recall on that trip?

A. Yes.

Q. I am not sure we are clear. You saw this passenger on two occasions. The first time you told me there were

persons waiting to be served, if I am right. I don't think I asked you about the second trip he came in. What was the condition with respect to passengers being served or waiting to be served the second time he came in, do you remember?

A. The second time he came in, passengers were still standing.

Q. Your testimony is he came twice. You said the first time there were persons waiting.

A. Yes.

Q. My attention has been called I didn't ask you about the second trip. Tell us if you remember about the second trip he paid to the diner.

A. Was anyone waiting, you asked me?

Q. Yes.

A. Yes.

Q. What was the situation, a crowd?

A. Still people waiting.

Q. Both instances, both times he came, your answer is that there were white persons sitting at the so-called "Jim [fol. 228] Crow" tables, is that right?

A. Yes.

Mr. Clark: You may cross examine.

#### Cross-examination.

By Mr. Lawson:

Q. Mr. White, you have been on this diner for 28 years in dining car service?

A. Yes.

Q. On this train 35, you were in charge of these "Jim Crow" tables, so-called?

A. Yes.

Q. Did you have instructions regarding these tables? Did your steward or anybody else tell you anything about those tables?

A. No, other than, well, they put those curtains up there, you see. They said the curtains were supposed to be used for colored passengers.

Q. Who told you that?

A. The steward, he gets all instructions, and tell us.

Q. These curtains are used all the time Negro passengers sit at those tables?



A. Yes.

Q. Those curtains, you say there are two of them?

A. Yes.

Q. One comes one way, keeps the aisle open, one comes to the aisle, keeps a clear passage?

A. Yes.

[fol. 229] Q. The point where those curtains meet is at the corner of the table, is it?

A. Yes.

Q. Use them clear round?

A. Yes.

Q. Is it not a fact that in the summertime back behind those curtains it is hot and warmer than in the other part of the diner?

A. No, you see the diner is air-conditioned. It has about the same temperature.

Q. Those tables or rather curtains hang down across to the table, there isn't space between the table and curtains, is there?

A. You mean from the floor?

Q. No, the curtains come down to the floor?

A. Yes.

Q. There isn't much space between these curtains and the table? The curtains come down pretty much like that?

A. Yes, right down across to the chair.

Q. The negroes are completely obscured when those curtains are drawn unless you open the curtains?

A. When both of them are drawn, yes.

Q. That is what I mean. You find it more difficult to serve colored passengers in that small space than you do in the body of the car?

[fol. 230] A. We serve from the opening of the curtains because the curtains are hanging on the side.

Q. Interferes with the passenger?

A. It is right behind the passenger.

Q. It is not as comfortable to the passenger back there as it is in the body of the car, is it? You understand me?

A. I couldn't say whether it was or not. I never heard anybody complain about that.

Q. From your observation, seeing the curtain there, seeing the people behind it, could you say it is as comfortable and convenient as the seats in the body of the car?

A. I am afraid to say that, because I haven't heard any-

one complain. I don't know whether they would feel uncomfortable behind there or not.

Q. Do you think you would feel uncomfortable behind there? You understand me, Mr. White. We are trying to get at the truth of this. Nobody is going to bother you. You are going to have your job and everything. Nobody is going to bother you. I just want you to tell the truth. Do you think it is convenient and comfortable back behind the curtain as it is out in the body of the car?

A. Well, the curtain is just hanging behind the chair. I don't know. I couldn't say. It seems just the same to me. I couldn't say yes or no.

Q. I guess it would. Let me get at this a little different. One curtain comes from the wall?

[fol. 231] A. Yes.

Q. The other curtain comes from the other wall, so you have two curtains meeting, you already testified, at the corner of the table?

A. Yes.

Q. How do you get in behind?

Exam/ Johnson: I don't understand it that way.

Mr. Clark: He is putting words in the witness' mouth, Mr. Examiner. There was never any testimony that the curtains meet. They meet the corner of the table.

The Witness: Here is a table on this side and this table on the other. The curtains would come to here (indicating).

(Discussion off the record.)

By Mr. Lawson:

Q. Where was Mr. Henderson the first time you saw him?

A. Standing in front of the buffet.

Q. How long was he standing there at the buffet?

A. Maybe ten or fifteen minutes, I don't know exactly.

Q. When you first saw him, how many white passengers were at the big table?

A. I don't know.

Q. Was there one?

A. It was more than one, but I don't know exactly how many.

Q. But it wasn't full?

A. I am not sure but I think it was three. I am not quite sure of that.

[fol. 232] Q. How many at the small table?

A. Two.

Q. That was full?

A. Yes.

Q. So there was a vacant seat at the larger "Jim Crow" table?

A. Yes.

Q. When he came back the second time what was the situation with respect to those two tables?

A. I don't remember now.

Q. Was there anybody there?

A. Yes, there was some one there, just how many I don't know.

Q. The tables were not full? There were still vacant seats?

A. Those two tables?

Q. Yes.

A. I don't know.

Q. Certainly the first time there was at least one vacant seat.

A. I am pretty sure there was one at the big table, that is at the table that will seat four. I am sure of that.

Q. The second time he came back you are not sure whether there were any vacant seats.

A. No, I am not sure.

Q. Do you know whether there were any vacant seats in the body of the car?

A. No, I am not.

[fol. 233] Q. How long has the Southern Railroad been using this curtain to your knowledge?

A. About a year, I guess.

Q. Does this situation happen often, that is to say, are colored people not served often? Understand me now. Are the dining cars so crowded at times that Negroes have to wait or be served at their Pullman seats, or does this thing happen frequently?

A. Well, since they put this curtain up there, they usually take care of them pretty nicely.

Q. What do you mean by that?

A. I mean before they put the curtains up there, they would have to wait until the white passengers were served or be served back in the cars, you see. Since they put the curtains up there, if the whites are sitting there, after the whites finish, they would seat the colored. That is why I would say we would take care of them better.

Q. What has the curtain to do with the crowded condition or taking care of the passengers?

A. What has the curtain to do with it?

Q. You mean to say that since the curtain has been up there, there have been fewer passengers?

A. Colored passengers?

Q. Yes.

A. More colored passengers.

[fol. 234] Q. They have been taking care of those colored passengers more readily since the curtain?

A. That is right.

Q. Why is that?

A. Because before they had the curtains, they didn't have no way to "Jim Crow" them off from the whites, you see. They would all be the same place.

Exam. Johnson: In that case, the colored were not served then, before you had the curtain, until all the whites were served?

The Witness: Yes.

Exam. Johnson: Now you can serve them provided those tables are vacant?

The Witness: That is right.

By Mr. Lawson:

Q. At the same time you are serving the whites?

A. Yes.

Q. But you can't serve them behind that curtain if any white person is sitting there. At the "Jim Crow" tables when white passengers are sitting there, you are instructed not to serve colored people, aren't you?

A. Say that again.

Q. When there are white people at the "Jim Crow" tables, you are instructed, are you not, not to serve colored people?

A. No, I have never. My instructions are to serve anybody that sits down there.

[fol. 235] Q. Why don't you, under that instruction, why don't you serve a white person and a colored person, if they both sit down at the same time?

A. I do it quite often.

Q. You have colored and white people?

A. Sitting down at the same table.

Q. Why didn't you seat Henderson at that vacant seat at the table with four seats?

A. I don't do that. The steward does that.

Q. Do you know whether the steward made any attempt to seat Mr. Henderson that day?

A. I saw the steward and Mr. Henderson talking. What the conversation was, I don't know.

Q. Did you see the steward and Mr. Henderson walk toward that table?

A. I didn't see them walking at all.

Q. They were standing still?

A. When they were talking.

Q. Do you pull the curtain when a white person and a colored person are sitting at the same table?

A. No, I don't pull the curtain at all.

Q. The steward does that?

A. Yes.

Q. Does the steward pull it when there is a white person and a colored person sitting at the same table?

A. No.

[fol. 236] Q. It isn't pulled?

A. No.

Q. Let me clear up this one point. I am not quite clear. I want to get your final statement. When there is a white person sitting at the "Jim Crow" table, do you seat a colored person?

Mr. Clark: The witness said the steward seats them. He serves them after they are seated. That isn't the evidence of this witness.

Mr. Lawson: That is right.

By Mr. Lawson:

Q. Do you know what the custom is when a white person is seated at the "Jim Crow" tables and a colored person is seated there? Do you know what the custom is?

A. What the custom is?

Q. What the practice is? I mean does the steward come and seat this colored person? Does he tell him to wait? Does he send him to the Pullman car, or does he give him another table?

A. You mean if they are both sitting there?



Q. No, if the white passenger is sitting there, the colored person comes up to that table intending to sit there, what is the practice?

A. That is, whether the steward would seat the colored down with the white or not, is that what you want?

Q. Yes.

Exam. Johnson: Do you know?

The Witness: No.

[fol. 237] By Mr. Lawson:

Q. You see what goes on?

A. No, I don't see everything that goes on. I am busy. I will tell you what happens. Quite often white people come and sit down with colored people. I would leave you sitting there. I would go to the kitchen and come back and see whites sitting there.

Q. Is that a common practice? Does that happen quite often?

A. Quite often now.

Q. What would happen if a white person were sitting there and a colored person went and sat of his own accord at that table? Not saying the steward doesn't seat him, he just goes and sits down there with this white person.

Mr. Clark: There is no proof that ever happened. How could this man say what would happen?

Mr. Lawson: I am laying the foundation for that.

By Mr. Lawson:

Q. Does it ever happen?

A. Does the colored sit there, the white come and sit down?

Q. You answered that that happened.

A. I answered the white would come and sit there, didn't I?

Q. I am confused now. Here is a white passenger sitting there.

A. Yes.

Q. Does it happen often that while a colored person is sitting at the table, a white person comes and sits at that table, does that happen often?

A. It doesn't happen often, but it does happen.

[fol. 238] Q. Does it happen that while a white person is sitting at that table, a colored person comes and sits down there?

A. That doesn't happen.

Q. You have never seen that happen, never in your 28 years have you seen a colored person sit down at the table with a white person?

A. I say it doesn't happen often. I have seen it.

Q. What happened at the time you saw it?

A. Well, there didn't anything happen.

Q. You served them?

A. Yes, indeed.

Q. Did the steward object to it in any wise?

A. No.

Q. Did he say anything to you about it?

A. No.

Exam. Johnson: Any other questions?

Redirect examination:

By Mr. Clark:

Q. Do you number the tables by stations?

A. Yes.

Q. You said yours were 1 and 2?

A. Yes.

Q. No. 1 is on one side, is that the little table or the big table?

A. That is the little table.

Q. That is on one side, No. 2 is across the aisle from it?

[fol. 239] A. That is right.

Q. All the little tables, I take it, are odd-numbered tables?

A. Yes.

Q. All the big tables are even numbered tables?

A. Yes.

Q. So you number them across that way, criss-cross?

A. Yes.

Q. When you hang this curtain which is suspended from the top of the car on a rod, pushed back against the side of the car, when you bring that curtain into use, first from one side you pull it out so it hangs down between tables No. 1 and No. 3, is that right?

A. That is right.

Q. On the other side, you pull it out, it hangs down between tables No. 2 and 4, is that right?

A. That is right.

Q. It is just as near to table No. 3 as it is to Table No. 1, isn't it? The curtain hangs down then between the two tables.

A. Yes.

Q. Isn't that similarly true between tables No. 2 and No. 4 on the other side?

A. That is right.

Q. Are those curtains ever pulled so they meet across the aisle between the two tables?

A. No, sir.

[fol. 240] Q. Are they turned down the side lengthwise of the aisle so as to surround the table?

A. No.

Q. It is just between the two tables on either side of the car, is that true?

A. Yes.

Recross-examination.

By Mr. Lawson:

Q. You say now they serve white and colored people together more frequently.

A. Yes.

Q. When did they start doing that?

A. They started doing that, well, since the war.

Q. So that it was after May 17, 1942?

A. You mean that they started serving white and colored together, is that what you mean?

Q. Never mind what I mean, I want to get what you mean?

A. I want to understand what you are trying to ask me so I can answer you.

Q. You said since the war they have started serving white and colored people together.

A. Ask that question again, please.

Q. When did the Southern Railway start serving white and colored people together?

A. As to the date; I don't know.

Q. You said since the war, is that true?

A. Yes, since the war.

[fol. 241] Q. When did the war start?

A. I don't know.

Q. How do you know then it was since the war.

A. Because I know the war was going on.

Q. The war was going on when it started?

A. Yes.

Q. If the war started December 7, 1942, it was not going on when they were not serving these people May 17, 1942, were they?

Mr. Dixon: We all know when the war started.

Mr. Lawson: Apparently he doesn't. We want to get this witness straight. I don't want to confuse you.

The Witness: Will you straighten me out?

By Mr. Lawson:

Q. You said simply they started serving white and colored people sometime after the war started.

Mr. Clark: He never said anything of the kind. He made it perfectly clear that where the witness became confused. I think I must object to it on cross examination. It is hardly fair to the witness. He said very clearly that if there was a colored passenger sitting in the diner at one of the seats at the so-called "Jim Crow" table, and a white person came and sat down he would be served. He made that perfectly clear.

Mr. Lawson: That is right.

Mr. Clark: He asked about seating them. He said he doesn't seat them. He said I will be in the kitchen or pantry, I will come back and find the white person sitting there, [fol. 242] I will serve him. Then he reversed the order of things. It happens he may find colored and white persons sitting at the same table. He never said the steward sat them there, that there has been any change in the rule or policy of the Southern Railway in respect to serving. Those questions being put into the witness' mouth, I don't think fair cross examination.

Mr. Lawson: He did testify that if a colored person sat down by a white person he would serve him.

Mr. Clark: With the explanation if he found them there, it didn't make any difference, he would serve them.

Mr. Lawson: That is my point exactly.

Mr. Clark: I know you got the witness to the point where the Southern Railway served him and the date.

Mr. Lawson: He testified what you said at first. He also testified if this colored man sat down by the white man he would serve them.

Mr. Clark: That is right. He would have done that. The entire history, there has been no starting or change or anything about it.

Mr. Lawson: He said that, this witness said that did not start until after the war.

That is what you said?

The Witness: What?

Mr. Lawson: Serving white and colored people.

The Witness: I want you to ask me that over again, get me straight on it.

[fol. 243] --Redirect examination.

By Mr. Clark:

Q. I understood you to testify on cross-examination that if a colored person were sitting at one of your tables in the so-called Jim Crow tables, of course you would serve him. Would it be possible for a white person to come in and seat himself at that table? Could that happen?

A. Sure that could happen.

Q. If you then found a white person with a colored passenger at one of your tables, I take it you would continue and serve him, is that true?

A. Yes.

Q. Just at the close of your cross-examination there was some question asked of you as if there had been some change in the rules of handling this matter by the Southern Railway, and you made some reference to the war or something, since the war, I have forgotten exactly how it arose. I want you to tell me what you had in mind with respect to any change that might come about incident to the war situation, and the troops who travel over the road, would you explain that to us, about the mixing of the races?

A. Just as I said they have so many soldiers both colored and white, when they come in the dining room, the steward does not make any difference. He just lets them sit down there.

Q. They are soldiers as far as he is concerned.

A. That is right.

Q. In that case, if they were seated at your table, you [fol. 244] would serve them?



A. I would serve anybody that sat down there.

Q. As far as you know, has there been any change in the steward's method of handling civilian passengers in recent years? I mean since you got the curtains.

A. Since we have got curtains there has been a change, you see.

Q. That was a change?

A. That is right.

Q. Up to the time you got the curtains, you tried to seat them and serve them after the whites had been served?

A. That is right.

Q. You put the curtains up that enabled them to be served while the whites were being served?

A. That is right.

Q. Otherwise, we have been going along that way since?

A. That is right.

Mr. Lawson: Every time a colored person sits at that table you draw the curtain?

The Witness: A civilian.

#### Recross-examination.

By Mr. Lawson:

Q. You don't draw the curtain when colored soldiers sit there?

A. No.

Q. When a white and colored person are sitting there, the colored person was there first, then the white person, do you [fol. 245] keep the curtain drawn or do you push it back?

A. You mean a civilian?

Q. A civilian.

A. They come and sit right down behind the curtain, the white.

Q. You don't push the curtain back?

A. Yes. I don't push it back. It is pushed back.

Q. The moment the white man sits down, the curtain goes back?

A. Sometime they push it back themselves. The white passenger comes and sits down and pushes it back.

Q. Does the colored person ever push it back?

A. Yes, I have seen them push it back.

Q. Does it stay back? The steward, when he sees it pushed back comes and draws it again, or does anybody?

A. I don't remember seeing him drawing it after he pulled it up and somebody pushed it back.

Mr. Lawson: That is all.

Exam. Johnson: You are excused, Mr. White. We will adjourn for lunch until two o'clock.

(Whereupon, at 12:50 p. m. the hearing adjourned until 2:00 p. m.)

### Afternoon Session

Two p. m.

Exam. Johnson: Are you ready to proceed?

Mr. Clark: Yes.

Mr. Lawson: Yes.

[fol. 246] Mr. Clark: I will call Lieutenant Farrell.

Exam. Johnson: In regard to the deposition, your motion?

Mr. Lawson: I move the deposition of Lieutenant Farrell taken at the date and place as shown be admitted as part of the record.

Exam. Johnson: I feel that since Lieutenant Farrell is here and gave oral testimony, that that in fact is the best evidence. I am going to refuse to accept the deposition and make it a part of the evidence.

Lieutenant Farrell is here on the stand. If you have any further questions of him, why ask them at this time. We will be a little liberal in that, whether it is cross-examination or not. It might be a little leading, but we will clear this up. I don't think it will be any different than from what already has been given.

Mr. Clark: I hope my position with respect to this deposition is clear on the record. Out of abundance of caution, knowing it is something that does not often happen, may I make it clear?

Exam. Johnson: You may.

Mr. Clark: The deposition was taken at defendant's instance because we thought the witness might be called away and not be here when the trial came on. Finding when the trial did come on that he was here, we obviously brought him thinking that would be more satisfactory to all concerned, of course including the Commission itself. Having [fol. 247] put him on, I answered you I would not offer his

deposition in evidence. Obviously, unless it is offered in evidence, it is not a part of the record in the case.

Opposing counsel has the privilege of using it in cross-examination, of course. If opposing counsel wishes to use it, it will be complainant's evidence and not defendant's. I wish to make that clear. I was not objecting, if he wished to use it. So I wanted that in. I think that is in keeping with the new District Court rules. It has been a little time since I examined it. I am trying to make my position in keeping with what I understand the rule in the Federal Court would be.

Exam. Johnson: Is that your understanding of it, that he would be made your witness for any information that you are bringing forth at this time? He would be your witness for that.

Mr. Lawson: I understand that.

Exam. Johnson: I hate to exclude that because of the expense to the Complainant and the Defendant in taking this deposition, but I think that is correct and I will give you that privilege of asking him any further information you wish.

Mr. Lawson: That is one reason I wanted it. We paid for it. It cost us considerable money. We might as well use it. I don't want to be in the position that I am impeaching Lieutenant Farrell. I wanted to clear up one or two points, [fol. 248] if I might. I am not sure it is contradictory.

Exam. Johnson: Go ahead and do that.

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LIEUTENANT FARRELL, testified as follows:

Recross-examination.

By Mr. Lawson:

Q. In your deposition you were asked in preference to a white passenger would both tables have to be clear, and your answer was, "No, just one." Is that correct?

A. That is correct.

Q. Then the question was, by the complainant, "What I am trying to understand is whether or not if one white person was sitting at a table reserved for colored and got up or another white person came in while that first white person was eating, would you permit him to sit at the reserved table

when you knew there was a colored person already waiting to be served?"

Your answer was: "Would I permit the second white"——

Mr. Clark: I am handing a copy of the deposition to the witness for convenience. I think it really the witness' right to have it so you can follow the question.

Mr. Lawson: Yes.

On page four. These questions are not numbered. It is down near the bottom. What I am trying to understand is whether or not if one person was sitting at a table re-[fol. 249] served for colored and got up or another white person came in while that first white person was eating, would you permit him to sit at the reserved table while you knew there was a colored person already waiting to be served. Your answer was, "Would I permit a second white person to be seated at the reserved table, is that correct?"

A. Yes; that is correct.

By Mr. Lawson:

Q. I think that is all, except one question farther over, in other words, about four questions over. "In other words, it is not absolute reservation of the table for colored passengers?" Do you see that?

A. Yes.

Q. Your answer was, "It was not." Is that correct?

A. Yes.

Exam. Johnson: Is there any further question?

Mr. Clark: I have none.

(Witness excused.)

KENNETH FRANK MCKENZIE was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your name and your address.

A. Kenneth Frank McKenzie, 1500 Kearney Street, N. W. Washington, D. C.

Q. Have you any connection with the Southern Railway Company?

A. Yes, I have been a steward for the Southern Railroad [fol. 250] for about three years.

Q. Do you know Lieutenant Farrell who preceded you?

A. I took over his position on the car when he left.

Q. Succeeded him?

A. Yes.

Q. On trains 35 out of Washington and the return trains, whatever they may be?

A. Yes.

Q. Do you recall the diner you had when you succeeded him?

A. The diner I had when I succeeded him was 3167.

Q. How many persons would that seat?

A. The seating capacity was 36 people.

Q. What people do you have now?

A. I have 3160.

Q. How many persons does it seat?

A. It seats 48 passengers.

Q. In other words, you have an equal number of four seater tables on each side of the aisle?

A. Yes, converted.

Q. You have converted, increased two-seater tables to four-seater on the right hand side?

A. Yes.

Q. Do you know whether or not your car 3160 was formerly a 36-seater car?

A. It was.

[fol. 251] Q. Do you know what has become or if anything is being done with car 3167?

A. It is being converted to 48 seats, aisle between. All the tables are.

Q. Aside from changing the seating capacity of these cars, are they substantially the same today as they were back in 1942?

A. The seating?

Q. The general layout of the car.

A. The general lay-out is the same except there are 48 seats, 12 seating accom-odations.

Q. I want to ask you if in your experience as a steward, you have noticed any increase in the number of travelers who desire dining car service over recent months within the passengers?

A. A decided increase in diners using the dining car.



Q. Would you say during the past year there has been a substantial increase?

A. During the war.

Q. War activities?

A. That has brought it on more and more.

Q. On this run, have you had occasion to not be able to serve the number of people who came in for meals or at dinner, train 35, before you were cut off at Greensboro?

A. I have on two or three occasions had to cancel checks.

[fol. 252] Q. Do you know whether or not there was a provision for serving sandwiches, coffee and the like on the platform at Greensboro and the like for those that may not have been able to be served?

A. The Union News has a concession as far as I know. I do know the Union News serves coffee and sandwiches on the train.

Q. At Greensboro?

A. I think they serve it on the platform at Danville, I am not sure.

Q. They do serve on the train?

A. They do serve on the train, the coach section.

Q. Did you hear Lieutenant Farrell's testimony?

A. I was listening. I sat there.

Q. I take it you heard one of his waiters, John White's testimony?

A. That is right. He is my pantry man.

Q. Not going over that, I do not ask you to adopt it or anything of the kind, you do know about these curtains you heard them testify about?

A. Yes.

Q. Are those curtains still being used on the car you operate?

A. They are.

Q. You succeeded Lieutenant Farrel. Were curtains on the car?

A. They are. With the new car converted, it is the same [fol. 253] formation except eight seats instead of six.

Q. It has the same curtains?

A. The same curtains.

Q. There has been some other change, I believe, made. I want to hand you a little slip here about seven inches long and about two and a half inches wide, with the word in big black letters; "Reserved," on it. I hand you one of those

and ask you if that has any place or connection with the handling of passengers in your diner.

Mr. Lawson: I object, Mr. Commissioner. As I understand it, Mr. McKenzie started to work after Mr. Farrell; we are dealing with the incident on May 17. The fact they have put up this since, does not seem to me to be relevant.

Exam. Johnson: I think it does have a bearing on account of part of your complaint where you are asking—

Mr. Lawson: To cease and desist?

Exam. Johnson: Yes, and to establish for the future for the transportation of complainant and other negro interstate passengers equal and just dining car treatment and facilities.

Mr. Lawson: Yes. While we are asking for better service in the future, I don't think they have a right to show now, subsequent to the subject matter of this complaint, that they have instituted it.

Exam. Johnson: That is part of the complaint, that prayer for the future service.

[fol. 254] Mr. Lawson: Yes. I understand that. My point is that at this point they cannot set up this change. They cannot show it here when the order is issued.

Exam. Johnson: I don't think they have shown that was in effect at the time. It may have been.

Mr. Lawson: They have not shown.

Exam. Johnson: I imagine this would apply to part of the complaint, referring to the future facilities.

Mr. Lawson: Yes. I understand that, but my point is this, since there is no testimony this reservation sign was in effect on May 17.

Exam. Johnson: There has not been.

Mr. Lawson: There is no testimony on that. I think then they are not permitted under the rules to offer it now. Notwithstanding my prayer for future relief.

Exam. Johnson: I will have to rule against you on that.

Mr. Lawson: All right.

Mr. Clark:

Q. You heard, I take it, Mr. Farrell's testimony with respect to what has been called the Jim Crow tables?

A. Yes.

Q. Reserved tables?

A. Yes.

Q. I want to ask you if this sign suggests anything in that connection to you. If so, tell us what it is. I don't want to be charged with leading.

[fol. 255] A. Well, this sign was issued with a letter or bulletin dealing with colored passengers. I don't just know the wording of the bulletin. A while since I actually saw the thing. I haven't got it with me. What it meant anyway was when we made a call, the first call for dinner, we were instructed to place these cards on the table. Draw the curtains and send the waiter up to make the call in the very front of the train, for dinner, and as the passengers came in we seated them in the car. We seated them to the capacity of where those curtains are. And if a colored passenger came, that was his place to sit.

Q. You heard the preceding witness, I take it, say that white persons would come in and sit, seat themselves at stations 1 or 2, the so-called Jim Crow tables?

A. Yes.

Q. As I understand your testimony, you put that on those tables to mark the reserved?

A. That is right, to mark it reserved.

Q. Do you or not take that action when you open the car, say, and call all in for dinner? You announce dinner as being served, do you draw the curtain then and place the call?

A. The curtain has already been drawn and the card is on the table. That is to give me a chance.

Q. Those two tables seating six persons are then seated [fol. 256] aside and reserved for negroes who may desire dining car service.

A. Yes, that is so.

Q. That is what that card is for?

A. That is what was given me with the instructions to that effect.

Q. Do you carry out those instructions?

A. I do.

Q. Do you know whether that is done on runs on other trains where you handle your diner on?

A. As far as the steward's instructions, I can't say they actually carry out the instructions.

Q. The trains you are on?

A. My diner runs on that train. I run the diner on the train it is on. I am not in position to talk about other people.

Q. Do you know whether or not that is a regulation peculiar to you, were the instructions given only to you?

A. It was written instructions, what we call a letter given out on various improvements, necessary enlightenments they want you to carry out on the Southern Railway.

Q. That does not apply to you alone?

A. Written with my name, the agent has half a dozen others with the stewards' names. I get one of them.

Q. Mr. McKenzie, I don't know whether it has ever happened or not, but would it be possible to let us reverse the [fol. 257] thing. I don't know, suppose you had colored passengers who came in in just the reverse order of the number which they come now. Now, we have very few colored. Suppose the great majority would come in for a meal. What would you do with the whites, would you put them behind the curtain and reverse the order?

A. You mean if you had the majority of colored people to what you had white, is that what you mean?

Q. Yes.

A. That would be the reverse around, the seating accommodations according to the number of passengers.

Q. The reverse of that to happen, the colored passengers, have you ever had that to happen?

A. I have never had it to happen. That is the only way I could handle the situation if it came up.

Q. If it came up, you would reverse the order?

A. It is the same thing around. It applies both ways.

Q. On this curtain we speak of, it hangs down when in place from the rod across the car, a little higher than a man's head, right down straight between tables 1 and 3, on one side, and 2 and 4, on the other. Is that correct?

A. That is right.

Q. Is there anything else about that curtain that would mark off or surround the two tables?

A. There is no possibility. I think that has been tried to describe before, just how this curtain was. The curtain [fol. 258] hangs on curtain hooks, on a rod. Sometimes the curtains maybe get hooked up, doesn't get hung up properly; the steward hasn't time to drape curtains when he has 48 people or 36 people to take care of. He does make that attempt to draw the curtain. If the curtain is probably drawn, or half drawn, he has done the technical thing. As far as he knows. He isn't going to stop and unwind rings.



## Cross-examination.

By Mr. Lawson:

Q. You say that letter regarding this reservation—what was the date?

A. I can't tell on dates. It was a matter, let me see, I took the car over sometime in June. It was between June and September. Between midsummer and early fall.

Q. So you could not know the date of it?

A. I don't keep actual dates.

Q. Do you have other written instructions? Have you since you have been a steward received any other written instructions than this one?

A. Than this one with the reserved card? No, I have not had written instructions.

Q. Do you mean prior or after?

A. Any time.

Q. The written instructions I understood you to mention.

A. The written instructions, I understood, when I went on the railroad, colored passengers were served after white passengers. Then we had the instructions of colored passengers being served beyond the curtain.

Q. Both written?

A. Yes.

This is just more of a clarification. These were given us to let people see when they came in the diner, it was reserved, and they would not go sit down there and I try to haul them off.

Q. When did you get these written instructions regarding service of negro passengers behind the curtain or is that this same letter?

A. As I say; it is not.

Q. The written is not?

A. Not appertaining to the original, which was around the beginning of the war. I just don't know when that was. It was when the curtains was instituted.

Q. With respect to our friend curtain, would you say that curtain drops down closer to table number one or three?

A. Well, that curtain is in between two tables. It is done by the measurements of accountants to put the curtain up, he measures it between two tables in the center.

Q. Center?



A. It draws between the two tables which has the chairs; therefore it runs between the backs of the two chairs.

Q. Have you ever in your experience had this situation where at the small table there were two colored passengers, [fol. 260] at the large table, the Jim Crow table across the aisle, there were four white passengers?

A. Yes.

Q. There is no curtain then separating those people?

A. No curtain is probably drawn, drawn before the meal. I am not going to start undrawing curtains. I have 48 people. That curtain to me doesn't mean anything. If it is drawn, it is drawn. If it is not drawn, it is not drawn. I am not going to start draping it up and hooking it up on a hook.

Q. Have you any complaint from white or colored people about this curtain?

A. I have never had any complaint from either people.

Q. Do you have any oral instructions?

A. I don't go by oral instructions unless my superintendent actually tells me what to do. He doesn't tell me what to do unless he does it in writing. That is a system they go under. That is the only thing I have to go for in those letters. I keep those in a book to refer to.

Q. That isn't quite responsible. Have you ever had any oral instructions from the superior?

A. Appertaining to what?

Q. To the running and operation of the diner in general or in respect to negro diners, passengers.

A. I have had no oral explanation at all. I have a letter. I carry that out to the best of my ability.

[fol. 261] Q. That is what I wanted to know.

A. Yes.

Mr. Lawson: I think that is all.

Exam. Johnson: Have there been times, Mr. McKenzie, when white persons have been served behind the curtains, that is when the curtains are in place?

The Witness: The idea is to fill the capacity of the car with white passengers up to those curtains. If there are no colored passengers that present themselves, you can't see anyone anywhere, you just draw the curtains, go ahead and fill the car up.

Exam. Johnson: I was thinking those were pulled before the car is opened.

The Witness: That is right, before the car is opened.

Exam. Johnson: If white people should later occupy those seats, are the curtains just left in place?

The Witness: They are probably left in place. It just depends on how the situation was. If I was what we term up a tree, I don't know that I would take the trouble to draw them all the way back. I would probably switch them. If they went back, it was all right. If they didn't, they stayed there.

Exam. Johnson: Is there any other question on direct?

• Redirect examination.

By Mr. Clark:

Q. You have been asked about the written instructions. [fol. 262] I hand you a paper and ask you to read that and see if it refreshes your recollection.

A. That is right. As I say, if I was pushing curtains back—

Mr. Clark: I haven't copies. I will be glad for him to read it in the record.

Mr. Lawson: I want to see if the paper is worth reading.

(Counsel examines paper.)

Very well. This is Joint Circular No. 61.

The Witness: "August 6, 1942.

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken, then, if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you."

[fol. 263] Recross-examination.

By Mr. Lawson:

Q. Mr. McKenzie, in view of this instruction regarding this advice to negro patrons, that they would be served as soon as compartments were vacant. What would you do if the diner was full, I mean if the Jim Crow seats were full of white people and colored passengers came in? What would you say or do?

A. I would explain to the colored passenger as soon as the white passenger got out, as soon as the first table at least got cleared, we would give them seating accommodations in that part that is reserved for colored passengers.

Q. Assume there was one vacant seat in the body of the car. All other seats were taken, Jim Crow seats, and all, would you under any circumstances, assume one fact further, that the train as in this case was nearing the point where the diner would be taken off, would you serve that colored person in a seat in the body of the car?

A. I would not. I would give that colored person the privilege of being served in the Pullman car, in the section or seat, whatever it was, on the train; according to, as far as I know, the state laws either of Virginia or North Carolina, you would have to do that.

Q. Of course, you know nothing about the subject matter of this complaint in this Henderson case?

A. No.

[fol. 264] Mr. Clark: Would you like a copy of this "Reserved" thing for the record? I have described it.

Exam. Johnson: I don't think it is necessary.

No further questions. You may be excused.

(Witness excused.)

R. K. McClain was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. You have just been sworn?

A. Yes.

Q. Give your name, say where you live, what city.

A. R. K. McClain, Washington, D. C.

Q. What position or office do you hold with the Southern Railway Company?

A. Assistant Vice-president in charge of transportation and operation.

Q. That is also of the other lines which go to make up the Southern Railway System?

A. All the Southern Railway System.

Mr. Clark: Mr. Examiner, the Southern Railway System Lines are those so held to be by the Commission in the Southeastern Livestock Case, 101 ICC reports. I forget the page. It has been up several times.

By Mr. Clark:

Q. Transportation is under your jurisdiction?

[fol. 265] A. Yes.

Q. The Rule Book for the government of employees is issued, I take it, by the operating department. Have you any connection with those rules?

A. The Rule Book is signed by the Operating Vice-President. I come next to see if they are enforced.

Q. You are the man that actually deals with them?

A. Yes.

Q. Have you had occasion to consider the question of dining cars and the serving of white passengers and colored passengers in the diners? Has that been a subject that has been considered by you?

A. It has.

Q. I have before me a paper marked Southern Railway System, dated July 3, 1941. It is in two sections. One section deals with Pullman cars, which is not here involved. Section two deals with dining cars. I would like to exhibit this to the Examiner and let him see that the Pullman part is of no moment. That is the reason I am not putting it in as an exhibit, because I can't well separate it. There is a short rule there with respect to dining cars which I want to ask Mr. McClain to please read into the record. Will you read section 2.

A. "Section 2. Dining Cars. Meals should be served to passengers of different races at separate times. If passengers of one race desire meals served while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car



is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

Q. How long have you been Assistant Vice-President?

A. Approximately five years.

Q. Prior to that time had you been connected with the Southern Railway and System Lines?

A. Since 1900.

Q. During that period has your activities been in the operating department?

A. Altogether.

Q. In the operating department, that particular branch known as transportation?

A. Yes.

Q. As distinguished from shop work, things of that kind?

A. Yes.

Q. It is the running of trains, of handling of passengers and freight that is your particular duty?

A. That is it, sir.

Q. Have you had occasion, I believe you said you had occasion to consider this question of feeding the races in the diner?

[fol. 267] A. Yes.

Q. Can you give us in your own way something to show us the background or why it was necessary to put out such a rule as this? What is the motive back of it? What were you aiming at?

A. For a long period of time, the rule was that the different races would be served at different times, but in 1941, starting through that period, there was an increase of traffic. On a good many of the diners the breakfast meals would run into the noon meals. The noon meal would run into the dinner meal. There wasn't any time but what there was some race in the dining car at all times. That made it—

Q. No chance, I take it you mean to wait until everybody cleared out to serve the colored passengers?

A. That is right.

Q. That brought on the change?

A. That brought on the change. It was found necessary to work out some plan whereby both races could be accommodated at the same time.

Q. Then came on your curtain arrangement?



A. Then came the partition, arranging it with the curtain.

Q. More recently putting the reserved tags?

A. That followed so the Jim Crow end would be vacant until every other seat was taken in the dining car.

Q. That was one more step?

[fol. 268] A. One more step.

Q. The next step was to make the 36 to 48?

A. The 36 were increased to 48 seats.

Q. It was done over the System?

A. It was done over the System, practically all the diners now are 48 seats. All of them were increased. They are practically on that program now.

Q. Has there been within the past year or eighteen months any appreciable increase or decrease with respect to travel on your roads?

A. There has been quite an increase.

Q. Could you give us briefly some causes and reasons for that, how it happens?

A. It is principally due to the movement of the armed forces and other civilian travel, traveling on defense business.

Q. When you speak of armed forces, do you take the men in uniform, which we call troops, as well as selectees, inductees and the like?

A. I take all into consideration, furloughed men as well.

Q. Lets get back to the question of the initial rule you had. Your first idea was you would serve colored passengers who were in the minority according to this evidence. You would serve them after the whites had been served?

A. Either ahead or afterwards.

Q. But at different times?

[fol. 269] A. Different times.

Q. That was your first step, then you have made these other steps you have explained?

A. Yes.

Q. Go back to the broad question, why was it necessary to make this seeming segregation of the races?

A. Due to the temperamental people of the South, we did that to keep down friction.

Q. The Southern Railway operates through states we know from Washington South, Virginia, let us run down, Virginia, what comes next, North Carolina?

A. North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana.

Q. Those are the Southern states?

A. Yes.

Q. Of course we have some border states, Tennessee and Kentucky?

A. Oh, yes.

Q. Those are the states served by the Southern Railway?

A. Yes.

Q. Are you familiar with the people that live in those states in that territory?

A. Yes, I was raised in that territory.

Q. You told me, due to the temperament, is that just the [fol. 270] temperament, or is it the feeling and attitude of the people? What do you have in mind?

A. That is the feeling and attitude of the people. For example, I might express it this way. That is both races. If a certain compartment is set aside in coaches for the colored travel, certain for the white travel, the colored travel resents any white travel coming into their compartments. They even object to the white train-man having a seat in their compartment. The conductor and flagman or baggage master. Likewise, the white race, they object to the colored race coming into their compartments.

Q. You say, then is the separation, based on an idea of keeping peace and order on your trains?

A. Absolutely.

Q. The conductor of your train is under your general rules operating the road, is he the one in general charge of the train?

A. He is in general charge of the train and his duties are to see that order is maintained.

Q. Based on your experience in operating railroads in this section of the country, would the seating of white and colored passengers together by the steward tend to create peace and harmony or would it likely create confusion and discord and irritating situations?

A. It would create discord, probably end in a race riot [fol. 271] before it was over.

Q. Have we in the south unfortunately experienced difficulties along those lines in the operating of our road with our passengers?

A. In a good many cases.

Q. Do you recall they have actually gone to the point of suing the company in cases of that kind?

A. Several cases where they have actually entered suit.

Mr. Lawson: May I ask who entered suit against whom?

Mr. Clark: I was going to ask that.

By Mr. Clark:

Q. What kind has it been, a white person suing the railroad or a colored person suing the railroad, for injury or what?

A. Practically all colored passengers, I recall now.

Q. Colored passengers, mistreated, sue the railroad for damages?

A. That is what I alluded to, yes.

Q. It is a matter of keeping down friction.

A. Keeping down friction by providing separate compartments for the different races.

Q. In your testimony, now, this particular incident here happened on train 35, on the Washington Division, between Washington and Greensboro. I want to ask if your testimony is confined to that Division or part of the road or does it go over the road throughout the Southern territory?

[fol. 272] A. It goes over the whole Southern territory.

Q. The rules you have described, the reasons therefor, are not confined to this one train or these states?

A. The System as a whole, all Southern Railway trains south of the Ohio River, and South of the Potomac River.

Q. Do you have to operate in the light of Jim Crow laws?

A. Yes, in all states south of those rivers, the Ohio and Potomac River.

Q. That is all I was interested in proving, was the fact of the existence of such laws.

A. Yes.

Mr. Clark: I think it is pretty well recognized that they are there. I have conveniently at hand the Code citations, and sections, too, each one of them. If you will like, I will read them in or I will file an exhibit or write a letter later with a copy to counsel giving those citations and sections.

Exam. Johnson: We would like to have that, Mr. Clark, if you would later file it as an exhibit.

Mr. Clark: Then the Code will be available.

Mr. Lawson: Yes.

Mr. Clark: It is a good deal of trouble to copy them at length. Is that satisfactory?

Mr. Lawson: Yes.

Exam. Johnson: All right, that will be filed as an exhibit, within ten days. I won't give that a number until it comes in.

[fol. 273] Mr. Clark:

Q. This rule you read in, the general instructions rather that you read into the record, is that still in effect?

A. It is.

Q. That is a general rule, it is modified in minor particulars, I take it, as the occasion might demand from time to time, but that is the general basic rule?

A. General basic rule is right.

Mr. Clark: You may cross-examine.

Cross-examination.

By Mr. Lawson:

Q. Is it fair to assume your testimony is this, the rule and policy of the company is based on your desire to keep peace and good order among the races?

A. Absolutely.

Q. That is what I thought I understood. You say the reason back of that, farther, is based partially in your own experience because of the temperament and feeling of the races?

A. Yes.

Q. What are the feelings and temperament of the races predicated upon?

A. On the action when they do go into compartments not assigned to them. For example, we have had more complaints from the colored race than we have from the white race about white people coming into their compartments.

Q. Do you think that is fair, in view of the segregation? [fol. 274] Have you had any trouble as result of that colored people feeling they are kept from the white side it is only fair that the white people should be kept from their side?

A. That is fair. That is what we try to do is to keep peace and harmony, keep order on the train.

Q. Would you say that these feelings and temperaments are based on a sense of inferiority by one race or the other?

A. Probably so.



Q. One other question, I understood you to say the traffic increased around the beginning of 1941?

A. That is right.

Q. Why was the traffic increased at that time, if you know?

A. Due principally to preparation of defense projects such as that.

Q. Are you familiar with the Mitchell case?

A. Not generally, no.

Mr. Clark: I hardly think that is a proper question for a transportation man, a decision of the Supreme Court of the United States.

Mr. Lawson: That isn't proper. Strike that.

By Mr. Lawson:

Q. Has there been, Mr. McClain, an increasing number of lawsuits by colored people involving dining car facilities in recent years?

A. Yes.

Q. Do you know the reason for that?

[p. 275] A. Yes.

Q. Will you tell us?

A. It is principally due to the fact that the colored travel have insisted on going into the white compartment of the cars which is a violation of the Jim Crow laws.

Q. So that negroes have insisted in recent years on being served in the diner?

A. Being served in the diner. We have made arrangements to take care of that. Heretofore, there has always been sufficient time in the dining cars to serve both races at different periods.

Q. Did your company recognize the impracticability and unfairness of that old rule?

A. The old rule at that time was all right. It adequately took care of the situation. Then when conditions changed, we made different arrangements.

Q. With the old rule, they must be served separately. The new rule sets aside or undertakes to set aside these reserved seats or the Jim Crow seats. Is it a fact that when the diner is filled to capacity and colored people, there are no Jim Crow seats for colored people, no other provision is made for them other than offering to serve them in their space?

A. In their space. That is as to both races. We would



serve white passengers the same way, if they would come to the dining car and it is full. We will serve them at their seats.

[fol. 276] Q. If a colored person comes, the Jim Crow seats are full, you offer to serve them?

A. Serve them at their seats unless they desire to wait until there is room at the tables assigned to the colored race.

Q. Has your company taken into consideration that this reserved section imposes additional expense on colored passengers?

A. No.

Q. It has not?

A. No.

Q. Is there any difference in the practical application of the old rule and the new rule when the diner is full of white people? I mean by that, that under the old rule negroes could not eat if they were hungry until after the white people, or before.

A. Either before or after.

Q. In other words, they couldn't eat until they wanted to?

A. No, they had to take either one of those assignments.

Q. Under the new rule, they can't eat if the car is full with white people?

A. White or colored people, either. If the Jim Crow is full of colored people, they have to stand and wait just like the white people.

Q. There is no problem there, under the new rule negroes [fol. 277] can't eat when and where they want to if the Jim Crow seats are full of white people?

A. That same thing would apply to this. If the car, we have a good many troops to feed. We feed them before we feed the regular travel. If the dining car is full of colored troops, the white race waits until they all clear out before they can get a seat to eat.

Q. Why the discrimination between soldiers and civilians?

A. We give soldiers preference on everything, in loading trains, seats, every way. There is only one seat and a soldier, we feel the soldier should have the preference. Practically all the citizens in the country agree to that. We have had no complaints as to that.

Q. We certainly have none.

Does that apply to colored soldiers, too?

A. Yes.

# Redirect examination.

By Mr. Clark:

Q. The reference to soldiers prompts me to ask one question on redirect. Mr. McClain, you have, you say fifty soldiers to feed. The Sergeant in charge can bring 48 of them in and seat them right down?

A. Yes.

Q. While they are eating, neither white nor colored could be served, no matter how hungry they were?

[fol. 278] A. Now matter how hungry they were, the white people are treated the same as the colored race in the compartments assigned to them. If colored troops come in, we have a good many special movements of colored travel going back and forth, we confer with them, see when they want their meals, se- aside the hour they shall eat. While they are in the dining car, maybe 20, 30, 40 or 50 of them, then the white race cannot go in the dining car until all the colored race have finished and gone.

Q. Each month you fix up a statement as I recall of the number of extra cars operated on regular trains for the handling of troops.

A. Yes.

Q. My recollection is that it runs anywhere from—

A. Twelve to seventeen hundred, eighteen hundred.

Q. On all the trains on the System?

A. Yes.

Q. That means you have a carload or two carloads of troops on a regular train. Now you have got to feed these troops in the diner?

A. Yes.

Q. I want to ask you, to get you to elaborate and let me see if I understand you. You go to the sergeant and have those men come in in bodies.

A. Yes.

[fol. 279] Q. You try to feed them early or late?

A. Yes.

Q. Especially to themselves?

A. Yes.

Q. So that runs them in, you serve one carload of them, out they go, you bring in another?

A. The overflow. If there is not enough for the second, we bring the overflow in, feed those first. We have many cases like that.

Q. That is done irrespective of white or colored soldiers?

A. Yes. We have a good many troops that come into Birmingham early in the morning, going to Anniston, Alabama, only a short run from Birmingham to Anniston. We feed both colored and white troops in preference to civilian travel. We won't open the dining car unless the fact is known the civilian travel can be out of the way before the soldiers, either colored or white, come to eat.

Q. I want to ask you, isn't it a fact your steward will go back and take your army crowd, your troops, bring them in and feed them, get them started before you ever announce the diner is open to civilian travel?

A. Yes.

Q. That is an incident of war?

A. Yes, all of them, before they make any announcement of meals being served.

[fol. 280] Q. That might occupy every seat in your car?

A. Absolutely.

Mr. Lawson: That is all.

(Witness excused.)

J. M. PLASKITT was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your name and residence, please.

A. J. M. Plaskitt, Belhaven, Alexandria, Virginia.

Q. Are you connected with the Southern Railway System Lines?

A. Yes.

Q. That is the Company and System Lines just like Mr. McClain mentioned?

A. Yes, sir.

Q. How long have you been connected with the Southern Railway?

A. In my present position?

Q. First, in your present position, then as a whole, both.

A. Five years in my present position, since 1924, with the Railroad Company, on the System.

Q. Your present position is what?

A. Mechanical engineer.

Q. Is that a branch of the operating departments?

A. Yes, sir.

Q. That is the mechanical branch as distinguished from the transportation branch that Mr. McClain explained?

[fol. 281] A. Yes.

Q. It deals with the equipment?

A. We have charge of the acquisition, design and specifications for new locomotives and cars and the maintenance of all the rolling stock.

Q. Really, the rolling stock is your particular branch of the business?

A. Yes.

Q. We have testimony here about two diners, one 3167, another 3160. Those cars were originally 36 seat cars. The presently used car, 3160, Mr. McKenzie states now seats 48. He understood the 3167 was being also converted to a 48-seater. I want to ask you whether that is a general step on the part of the railroad or just confined to two or three cars?

A. I think it has been a general step that most of them have been converted to.

Q. In other words, that is enlarging your capacity and facility for handling diners?

A. Yes, it involved the use of a double row of tables on one side of the car with a row of single tables on the other side. That single table side, we are making double tables.

Q. That adds materially to the capacity of the car?

A. It increases it to 48.

Q. Under present conditions, perhaps obtained for some little time, has there been any difficulty in acquiring new equipment such as dining cars, if so, when?

[fol. 282] A. Since sometimes before the war started it has been impossible to get passenger equipment.

Q. Has there been any restriction, as we say, has the present equipment become frozen? How would you express it?

A. I would say it has become frozen.

Q. Mr. McClain says the passenger traffic has increased. Obviously the diner use has increased. Have you been able to get additional diners?

A. No, sir.



Q. So you are enlarging them as best you can to tide over and handle the public?

A. That is right.

Mr. Clark: Cross-examination.

Cross-examination.

By Mr. Lawson:

Q. In the corporation's attempt to acquire new rolling stock, has any information come to your attention as a reason for that, except the natural increases resulting from the war?

A. You mean the increase in passenger business?

Q. I guess I did not make myself clear. You have tried to get new rolling stock and couldn't because of the war conditions. It is frozen, and so forth.

A. That is right.

Q. Is there any other reason for the acquisition of new facilities, passenger facilities other than war conditions [fol. 283] that you can think of?

A. The necessity for additional equipment, of additional passenger equipment is governed entirely by the increase in passenger travel, whether it be from troops, army, navy marine corps or civilian travel. As to the length of time that may last, what will come after the war, I wouldn't be in position to predict.

Q. Has any information come to you along with the natural increases resulting from the war that there has been an increase in the negro passenger traffic?

A. I would say that I don't have any statistics right at hand as to the exact answer to that question. But I firmly believe that the colored travel has increased proportionately to the general increase throughout the country, probably.

Q. That is notwithstanding the war, or aside from the war, in the general evolution of things, as negroes get more jobs, more money, they naturally, like other people, try to travel in better facilities. If that is a fact, do you have any information indicating that negro passengers are increasing aside from the natural increase during the war?

A. I haven't any statistics that would enable me to answer that question.

Q. Aside from the statistical data, what is your impression?

A. Well, with the increase in negro employment throughout the nation as well as the white, or any other race, the impact of that, I think, is bound to be felt in the passenger train operation, especially with the curtailment of other [fol. 284] modes of travel.

Mr. Lawson: Thank you very much.

(Witness excused.)

J. D. SMITH was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your full name.

A. J. D. Smith.

Q. Where do you live?

A. 511 Second Street, Spencer, North Carolina.

Q. What connection, if any, have you with the Southern Railway Company?

A. I am a Southern Railway conductor.

Q. You run passenger or freight trains?

A. I am running passenger.

Q. How long have you been passenger conductor?

A. Practically six years.

Q. How long have you been in train service of the Southern Railway Company?

A. Braking and running as freight conductor since 1905.

Q. You have been conductor years, I take it, before you got a passenger run?

A. Since 1912.

Q. Back in May, particularly, May 17, 1942, were you serving as conductor on the road?

A. Yes.

Q. What train were you operating at that time out of Washington?

A. Train 35.

[fol. 285] Q. What time did that formerly leave Washington?

A. Schedule 2:00 o'clock P. M.

Q. Daily?

A. Daily, yes.

Q. What time would you arrive at Greensboro, North Carolina?

A. Around 8:55 to nine o'clock.

Q. I take it then, your run went on to Salisbury, where you were relieved?

A. Yes.

Q. Mr. Smith, the occurrence involved in this litigation is alleged to have occurred on May 17, 1942. You say you are the conductor on that?

A. Yes.

Q. Will you please tell us the consist of that train of that date?

A. Well, I would—

Q. Have you your book?

A. Yes.

Q. Refreshing your recollection, give the numbers of the car.

A. May was the fifth month. Beginning with head end, 656 that was a combination car, part of it baggage, the other end was passenger carrying car.

Q. Next one.

A. 1489, straight plain coach. Next one was 1200, that was a passenger carrying car. The next 1000, that was a passenger carrying car. 1677 was a passenger carrying car. 1792 was a passenger carrying car. 1459 was a passenger carrying car. 1367 was the diner. And car No. 57, Litch-[fol. 286] field, that was the Birmingham sleeper, Pullman car. S-24, McBayne, that was a Pullman, New Orleans, sleeper.

Q. So you had a combine of six coaches, a diner, and two Pullmans, is that right?

A. Yes, that is correct.

Q. Was that consist more or less than you formerly operated on 35?

A. Well, it was more.

Q. How much more?

A. By three cars.

Q. You mean three coaches or what?

A. Three coaches.

Q. Three extra coaches?

A. Yes.

Q. I believe that was on Sunday?

A. It was, yes.

Q. Does the week-end and Sunday have any effect on the travel?

A. It does.

Q. You did have three extra coaches?

A. Yes.

Q. Leaving Washington, could you tell me, the best you can, the number of passengers you had?

A. Well, I would say, week-ends, from experience, I had approximately three hundred passengers.

Q. On arriving at Greensboro, what would the number be?  
[fol. 287] A. Well—

Q. More or less?

A. More.

Q. Likely to be more?

A. Yes.

Q. Wouldn't be less?

A. Wouldn't be less.

Q. Do you recall your scheduled time at Danville, Virginia?

A. On that date, it was 7:38 arriving.

Q. Of course, if you were late, you would be still later than that?

A. Yes.

Q. Did you leave Washington on time that day, the 17th of May?

A. Left at 2:06.

Q. Six minutes late.

A. Yes.

Q. Do you recall the arriving time at Greensboro?

A. Around nine o'clock.

Q. I want to ask you if you are governed in the operating of trains by the rules familiarly known as the rule book you heard Mr. McClain mention? Do you have rules for the government of your train?

A. Yes.

Q. I am going to hand you a paper which I will mark Exhibit No. 1 for identification and ask you whether that paper contains excerpts from the rules governing you in [fol. 288] the handling of your train and the passengers



thereon in effect at that time? Would you like to check it against the rule book or do you recognize it.

A. Yes, I recognize these rules very clearly.

(Exhibit No. 1, Witness Smith, marked for identification.)

Q. Would you say that that paper represents a true and correct copy of the rules 1136, 1138, 1191, 1196, 1200, and 1201?

A. Yes.

Q. Of the several members of the crew, who is in charge?

A. The conductor, the train conductor.

Q. The crew is made up of the engineer, fireman, baggage master, brakeman, conductor, anybody else?

A. That is all the members of the train crew.

Q. You are in charge?

A. Yes.

Q. When you have a dining car on your train, it is in the immediate charge of the steward you heard testify?

A. Yes.

Q. Is the dining car part of your train and subject to your jurisdiction and general control.

A. Yes, my general control.

Q. If there should be any confusion on the train, the Pullman conductor, the flagman, or the dining car steward wouldn't attempt to eject a passenger but would call on you?

A. He would call on me.

[fol. 289] Q. You are the peace officer on the train, in that the short answer to it?

A. Yes.

Q. Do you know whether or not on this particular day of May 17, you received any complaint about any occurrence in the diner, in the Pullman cars, between any passenger or any member of your crew?

A. No, sir, I did not.

Q. No trouble of any kind?

A. It wasn't called to my attention at all.

Q. At Greensboro, North Carolina, do you know whether or not there is any provision for any agency to come upon your train or your platform with the view of serving lunches, coffee, or what?

A. I do notice a boy coming up with sandwiches and coffee at night.

Q. You have seen him there.

A. Yes.

Mr. Clark: If the Examiner please, we offer Exhibit No. 1.

Exam. Johnson: Exhibit No. 1 is received in evidence.

(Exhibit No. 1, Witness Smith, received in evidence.)

Mr. Clark: You may cross-examine.

Cross-examination.

By Mr. Lawson:

Q. Mr. Smith, this Exhibit No. 1 is not generally published so that passengers would know about it, is it? They are instructions from the company to you?

[fol. 290] A. In our book of rules.

Q. So the public wouldn't know you were the peace officer, would it?

A. I couldn't say.

Q. So far as you know, there is no way—

Mr. Clark: I will gladly answer that if the Examiner will permit me. In furnishing the information with respect to the so-called "Jim Crow" laws, I shall also give reference to the State statute giving the conductors police powers to maintain peace. The conductor doesn't know the laws. The law is back of his rules.

Mr. Lawson: I wanted to see if he knew that, see if as far as he knew a particular passenger knew anything about those rules.

By Mr. Lawson:

Q. Those rules are not published in the car or any place, are they?

A. No.

Q. Mr. Smith, was your train on time on the 17th, do you remember?

A. As well as I can recollect, it was.

Q. Could you tell me if it were on time, what state and city your train would be in at 7:45?

A. At 7:45, it should be at Danville, Virginia.

Q. So if the allegations which are the subject of this litigation occurred at all, they occurred within the State of Virginia?

[fol. 291] A. It did, if it occurred at 7:45.

Q. Any time prior thereto would be in the State of Virginia?

A. Yes.

Q. On this date, May 17, 1942, how many passengers would you estimate were above the average, how many approximately, how many more did you carry on this trip than you do ordinarily?

A. Well, ordinarily, first of the week, at that day and time, it has increased considerably since that time, I would say we would carry approximately a hundred or more.

Q. So that on this date you had about a hundred more than normal?

A. Probably more.

Q. Yet you only had one diner?

A. One diner.

Q. Do you recall seeing Mr. Henderson that day?

A. No, I don't recall.

Q. Talking about that trip on your train on May 17, was there a correspondingly increased number of Negroes? Was the train preponderantly white or colored, in proportion, I mean to the population.

A. I would say it was quite any number more of the whites than there were colored.

Q. That is true generally, I suppose, all the time because of the population?

A. Yes, it is.

[fol. 292] Q. Was there an unusual number of Negroes on the train that day, unusual number of whites, or both?

A. Due to the week end, it was heavy.

Q. Heavy, both were?

A. Heavy, that way.

Q. Were there a few more Negroes than usual as well as white?

A. No, just about the average Sunday travel.

Q. For both races?

A. For both races.

Q. On this night, this day, did you see anybody selling sandwiches or coming on the train?

A. I couldn't recall that.

Q. You didn't see it that night? At Danville or any other place, do these people come on selling sandwiches or fruit?

A. They are regularly at both places but I don't recall seeing them.

Mr. Lawson: I think that is all.

Exam. Johnson: If there is nothing more, the witness is excused.

(Witness excused.)

Mr. Clark: The defendant rests.

Exam. Johnson: Have you anything on rebuttal?

Mr. Lawson: I don't think so. No, I haven't.

I would like to clear up one or two points. Is this deposition in or out?

Exam. Johnson: That is out.

[fol. 293] Mr. Lawson: I wanted to make it clear. There was a little confusion about it.

Is it in order for me to ask now, Mr. Examiner, for an extension of time on this brief for the reason that I have a couple of other matters in the Court of Appeals. It would save my time and theirs writing and getting an extension. Could we agree now?

Mr. Clark: There is no objection from our side. We would like to indulge counsel.

Mr. Lawson: I do have a few matters in the Court of Appeals, if we could have a ten-day extension, Mr. Examiner.

Exam. Johnson: I will give you until April 5th.

Mr. Lawson: Yes, I appreciate that.

Exam. Johnson: No free copy of the record. Is there anything further?

Mr. Lawson: No, I think I am all clear.

Exam. Johnson: All right. The hearing is closed and briefs due April 5th.

(Whereupon, at 3:35 P. M., February 25, 1943, the hearing in the above-entitled matter was closed.)



ELMER W. HENDERSON v. SOUTHERN RAILWAY COMPANY

*Submitted October 14, 1943. - Decided May 13, 1944.*

Failure of defendant to furnish dinner service to complainant, a member of the Negro race, in its dining car in connection with a journey made by complainant on May 17, 1942, from Washington, D. C., to Atlanta, Ga., found to have subjected complainant to undue and unreasonable prejudice and disadvantage. Further found that no basis is shown for an award of reparation and that no order for the future is necessary. Complaint dismissed.

*Belford V. Lawson, Jr., and Marjorie McKenzie* for complainant.

*Charles Clark and A. J. Dixon* for defendant.

#### REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS AITCHISON, MAHAFFIE, AND ALLDREDGE

#### BY DIVISION 2:

Exceptions to the examiner's proposed report were filed by the complainant, and the issues were argued orally. Our conclusions differ somewhat from those recommended by the examiner.

Complainant, a Negro, is a citizen of the United States, and an employee of the Federal Government. By complaint filed October 10, 1942, as amended at the hearing, he alleges that on May 17, 1942, while he was traveling as a first-class passenger over defendant's line from Washington, D. C., to Atlanta, Ga., defendant "practiced undue and unreasonable preference and disadvantage against the complainant and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humilitating, discriminating, and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory, and unnecessary preference and advantage to certain white persons . . . in respect to transportation, and

facilities, in that it failed and refused to serve complainant at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes, but were allowed to be used by white persons," in violation of section 3 of the Interstate Commerce Act. We are asked to require defendant "to cease and desist from the aforesaid violations of said Act and in the future to establish, apply and enforce [fol. 295] for the transportation of complainant and other Negro interstate passengers equal and just dining-car-facilities and such other services and facilities as the Commission may consider reasonable and just; \* \* \* to remove and discontinue the impractical and unequal and humiliating practice of using curtains around the tables reserved for Negroes;" and to pay to complainant "reasonable and just damages \* \* \* for the aforesaid violations."

In his brief of complainant states that—

The specific conduct of which complaint is made and upon which this litigation rests is the defendant's refusal and failure to seat the complainant at a vacant seat at tables allegedly reserved for colored passengers at a time when those tables were partially occupied by white passengers and at a time when the complainant sought service; and the refusal of the defendant to notify the complainant when he could be served, as promised, before the diner was taken off at Greensboro, N. C., with the result that the complainant was never served.

On May 17, 1942, complainant left Washington at approximately 2 p. m. aboard defendant's train No. 35 bound for Atlanta, Ga., traveling as a first-class pullman passenger. The train consisted of 1 combination baggage-passenger car, 6 coaches, 2 pullman cars, and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, necessitating the use of 3 extra coaches. The pullman cars were in the rear of the dining car, making it necessary for pullman passengers who desired dining-car service to enter the diner through an aisle alongside the kitchen. From the kitchen end, the tables on the left side of the diner accommodated 4 persons and those on the right side, 2 persons. The car was equipped with curtains which, when drawn, separate the 2 tables nearest the kitchen, hereinafter referred to as the end tables, from the other tables. When drawn, the curtains extend from the

sides of the car to, but not across, the center aisle; they do not extend along the aisle side of either end table.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accommodated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

[fol. 296] In July 1941, defendant issued to its passenger department employees a circular of instructions concerning accommodations for passengers of different races, one section of which reads:

#### Dining Car Regulations

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

On August 6, 1942, these instructions were supplemented as follows:

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain

should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you.

Since the curtains were installed, Negro passengers have been served as they presented themselves in the diner, except under unusual circumstances such as prevailed, as described later herein, when complainant failed to obtain dining-car service.

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station," or group of tables, so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers use the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white persons are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining-car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

[fol. 297] In view of the conflicting testimony of complainant and witnesses for defendant, as to the circumstances and conditions under which the defendant failed to furnish the complainant dining-car service, an abstract of that testimony is here set forth.

*Testimony of complainant.*—I went into the diner at about 5:25 p. m., soon after the call for dinner. I found probably one-third to one-half of the tables occupied. No



other passengers were waiting to be seated. I requested service and was informed by the steward that I could not be served, as neither of the end tables was vacant. As I observed, there was one person at the two-seat end table and two at the four-seat end table, leaving three empty seats at the two tables. There were empty seats throughout the car. The steward suggested that I return to the pullman, and said he would call me. I waited about 15 minutes, then retired. I returned to the diner at about 7 p. m. and found the car crowded but, as I recollect, there were empty seats at some tables. I again asked the steward for service. He said the laws of the State through which we were passing (Virginia) prevented him from serving me at that time. He suggested service in the pullman. I refused because I felt that under the law I had a perfect right to eat in the dining car if seats were available. The steward then said he could serve me only when and if one of the tables behind the curtains became vacant. One white person sat down at an end table while I was there. I left, but went back a third time about a half hour later. The steward then stated that he would call me in a short while, but did not do so. The diner was taken off the train at Greensboro at about 9 p. m., and I was not served. There were vacant seats at the end tables the first two times I was in the diner; I do not remember about the third time. Neither end table was entirely vacant while I was in the dining car. The steward was courteous; there was no confusion; our conversation attracted no attention. I was hungry, inconvenienced, humiliated before servants, my feelings were hurt, and I was somewhat ill the next morning.

*Testimony of witness Farrell, an officer in the Army Air Forces, formerly for 6 years a dining-car steward in the employ of defendant.*—I was in charge of the dining car on train No. 35 on May 17, 1942. The day was Sunday, and the train was crowded. When the doors were opened for dinner at about 5:30 p. m., many passengers were waiting. The car filled promptly, still leaving a line. I first saw complainant coming around the line; he made himself conspicuous by passing the line. I was standing at the head of the narrow aisle opposite the kitchen, my customary position when the car is filled. To my best knowledge every seat was taken at that particular time; they (the passengers in line) would not have been standing there if there were



any vacant seats. I told complainant he was not first; that [fol. 298] other people had been waiting longer than he had. I suggested that I could give him better and quicker service in his pullman space. I told him that he could see the crowded conditions, and asked him to help me, to cooperate with me, to let me serve him in his space. I could not serve him any other way. He refused and, after a few minutes, left the car. About an hour later, he came back. I told him conditions in the diner were unchanged and instructed a waiter to take his order and serve him in the pullman. When he refused again, I explained that I could only seat him at one of the end tables when it was available, and that I would have to draw the curtains. He said "he would not be embarrassed or humiliated by sitting behind the curtains," and went out. I did not see him again. I talked with him with the greatest of courtesy; there was no commotion or confusion. Asked if complainant refused to be served at an end table, the witness first answered, "Yes," but on cross-examination qualified that answer, saying, "He did not exactly say he didn't care to sit behind those curtains. He questioned whether I could curtain it (the table) off after he did sit down there." I did not send for him because at no time was one of the end tables vacant; there could have been a vacant seat but not a vacant table. There was no time when I could have reserved space for him. When the diner was taken off the train at Greensboro about 9 p. m., "there were a lot of passengers not served."

A steward has no discretion about mixing the races, in violation of the company's regulations.

*Testimony of witness White, a dining-car waiter employed by defendant continuously for 28 years.*—My regular run is on train No. 35 out of Washington. On Sunday, May 17, 1942, I served the end tables in the diner on that train. I first saw complainant standing in the end of the car near the kitchen talking to the steward shortly after we made the call for dinner at about 5:30 p. m. I heard no part of their conversation. At that time, three white people were seated at the larger end table, and the two-seat end table was fully occupied. When complainant came to the diner the second time, white people were seated at both end tables; but I do not remember how many. I only saw him twice. Either the first or second time that he was in the diner, I offered to serve him in his space, and he

declined. Both times I saw complainant, other people were in line waiting to be seated. The diner was continuously filled from the time we first started serving until we quit. We usually are very crowded on Sundays. Complainant was the only Negro passenger who came into the dining car on the trip.

Upon the evidence, due weight being given the mutually corroborative testimony of witnesses Farrell and White, the manner in which defendant usually seats its dining-car patrons, and the crowded condition of the train, we [fol. 299] find these facts: When the dining car was opened at about 5:30 p. m., a number of passengers were waiting to enter. The car filled promptly. When all tables other than the two end tables had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at an end table was empty when complainant first demanded service, but neither then nor later was either end table entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, from the time defendant began serving dinner until it became necessary to decline further service so that the car would be cleared of patrons when the train reached Greensboro. Complainant was tendered, and declined, service in his pullman space without charge therefor in addition to the regular dining-car prices. The service offered him differed from that furnished in the dining car only as to the place of service. The steward did not send for complainant, as he promised to do, because at no time during the meal was there available space in which complainant could be served in the diner in a compartment separated from tables that were occupied by white passengers. Complainant was one of many passengers who sought dining-car service and had not been served when the diner was removed from the train at approximately 9 p. m.

The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate

passengers. See *Chiles v. Chesapeake & O. Ry. Co.*, 218 U. S. 71, and cases therein cited. Section 3 (1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In *Mitchell v. United States*, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding [fol. 300] with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to

its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose.

Turning now to the prayer for damages: The complaint in this regard asks:

(4) That reasonable and just damages, attorneys' fees and costs be assessed against the Railroad for the aforesaid violations;

The matter of damages was not argued in the initial brief filed by the complainant. In the request for specific findings, he asked for a finding by us:

Fourth: That the complainant has proved the allegations contained in this verified complaint and is entitled to the relief prayed for therein including such damages as to the Commission may seem reasonable and just.

In his exceptions to the report proposed by our examiner, which did not discuss the claim for damages, the complainant excepted in that—

The proposed report admits that the dining car accommodations furnished the complainant were "unjustly discriminatory and unduly prejudiced," yet it recommends dismissal of the complaint. The complainant sustained damages, suffered embarrassment and hunger, was not served, and has been compelled to pay several hundred dollars in costs and attorneys' fees (admittedly not chargeable to the respondent, but nevertheless real to the complainant). The report gives no reason for the failure to recommend damages which the Act clearly allows.

Our jurisdiction to award damages flows from section 8 of the act. That section is as follows:

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited [fol. 301] or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.



The right to recover under section 8 is limited to the pecuniary loss suffered and proved. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 206. Compare *Crosby v. St. Louis-S. F. Ry. Co.*, 112 I. C. C. 239, 243. Before any party can recover under the act, he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 460.

We have already shown in abstract form the substance of the complainant's testimony with respect to the claim for damages. In his direct examination, the claim was not mentioned, nor did he indicate that he had sustained any damage.

On redirect examination the complainant testified:

Q. Tell us what damages you suffered?

A. Oh, I was hungry. I felt very inconvenienced and somewhat ill the next morning.

Q. Were you embarrassed?

A. I was very seriously embarrassed.

Q. In what way?

A. I was embarrassed before the patrons whom I am sure observed my predicament. And I was embarrassed before the servants on the car, and my own feelings were very seriously—

Q. When he refused to serve you, when you saw white people getting up, being seated in the "Jim Crow" cars, when he suggested to you you'd have to sit by the curtain, you suffered personal embarrassment and inconvenience to a great extent, did you not?

A. Absolutely.

The statement with respect to inconvenience and being somewhat ill the next morning is not supported by any allegation in the complaint, and was not elaborated in the course of the testimony.

With the foregoing principles in mind, we find that the record does not establish that the complainant suffered any pecuniary damage because he was not served with the evening meal as he sought, or because certain white persons were so served while he was denied proper opportunity to purchase from the defendant such a meal for himself. While complainant testified that he "felt very inconvenienced and somewhat ill" the following morning, the

degree and extent of his illness, and whether the illness was related to the omission of defendant to serve him with a meal, and whether he suffered any pecuniary loss as the result thereof, are not in any wise established.

[fol. 302] From the earliest days, it has been considered by us that we could make no award of reparation beyond the amount of damages shown with reasonable certainty, and that a finding of damages cannot be based on general allegations or statements alone. As our jurisdiction is confined to the awarding of "damages sustained in consequence of any . . . violation" of part I of the act, we cannot award either nominal damages or substantial damages in the way of smart-money, or for a punitive purpose, or to serve as an example to others. Under the act, we may award damages only for the private wrong and to the extent of the private damage suffered. For any public wrong, the penalties are collectible by the government alone. *Pennsylvania R. Co. v. International Coal Mining Co.*, *supra*, at page 206.

Upon this phase of the case, we therefore find and conclude that no basis for an award of reparation for damages has been shown, and that it does not appear that the complainant has sustained any damages in consequence of the violation of part I heretofore found. We have no jurisdiction in this proceeding to award attorneys' fees, *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, or costs, *Pittsburgh & W. Va. Ry. Co. v. Interstate Commerce Commission*, 280 Fed. 1014.

The complaint will therefore be dismissed.

258 I. C. C.

[fol. 303] At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 13th day of May, A. D. 1944

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

No. 28895

ORDER

This proceeding being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 2.

W. P. Bartel, Secretary. (Seal.)

[fols. 303A-304] At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 18th day of September, A. D. 1944.

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

No. 28895

ORDER

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of complainant for further hearing and oral argument;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fols. 305-306] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28895

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

**Transcript of Hearing**

Hearing Room A, Interstate Commerce Commission Bldg.  
Washington, D. C. Tuesday, October 15, 1946.

Met, pursuant to notice, at 9:30 o'clock a. m.

Before: HORACE W. JOHNSON, Examiner.

**APPEARANCES:**

B. V. Lawson, Jr., 2001 11th Street, N. W., Washington, D. C., appearing for Elmer W. Henderson.

A. J. Dixon, Southern Railway Building, 15th and K Streets, N. W., Washington, D. C., appearing for Southern Railway Company.

[fol. 307].

**PROCEEDINGS**

Exam. Johnson: All right, gentlemen, we might as well proceed. I believe the parties are ready.

The Commission has set for hearing at this time and place Docket No. 28895, Elmer W. Henderson versus Southern Railway Company.

Who appears for complainant?

Mr. Lawson: I do, Mr. Examiner, B. V. Lawson, Jr.

Exam. Johnson: Of Washington, D. C.?

Mr. Lawson: Washington, D. C., yes.

Exam. Johnson: And for the defendant?

Mr. Dixon: A. J. Dixon, of Washington, D. C., for the defendant.

Exam. Johnson: We are, of course, familiar with this case because this is a rehearing. On May 13, 1944, the Commission issued a report in this case, in which it found that failure of defendants to furnish dinner service to complainant, a member of the negro race, in its dining



car in connection with a journey made by complainant on May 17, 1942, from Washington, D. C., to Atlanta, Georgia, to have subjected complainant to undue and unreasonable prejudice and disadvantage.

It further found that no basis was shown for an award of reparation and that no order for the future was necessary. The complaint was dismissed.

[fol. 308] On September 13, 1946, however, the Commission issued an order stating that upon further consideration of the record in the above entitled case, and of the decree of the statutory court in and for the District of Maryland, entered February 13, 1946, it is ordered that the above proceeding be and it is hereby reopened for further hearing. And today we are to have the rehearing.

I might make the statement, also, that the report of the statutory court referred to ended by saying, "For the reasons given herein, the order of the Commission dismissing the complaint must be set aside, and the case remanded to the Commission for further proceedings in the light of the principles outlined in that case."

As you understand, this is a rehearing of the case, and we will proceed by having complainant call its first witness.

Mr. Lawson: Mr. Examiner, we have no testimony, no witnesses. There is no dispute, I think, about the facts and my understanding of the court's decree is that it is a matter of law and a matter of new or certainly different regulations. So for that reason we don't have any testimony.

I would at the proper time like to make a short argument, but other than that we have nothing.

Exam. Johnson: I think we could hear the argument now, if you care to. You are going to file a brief, though, in this case?

[fol. 309] Mr. Lawson: I am going to file a brief, yes, but if it is all right with the Commission, I would prefer to make the one argument to which I would ordinarily be entitled after the defense has put on its case. It might save time.

Exam. Johnson: Well, I think that will be satisfactory, will it not, Mr. Dixon?

Mr. Dixon: All right with me.

Exam. Johnson: All right, then, Mr. Lawson, we will hear you then after we hear witnesses that the defendants have.

Mr. Dixon, you may call your first witness.

Mr. Dixon: Mr. McClain appeared as a witness in the first hearing. I don't know whether you want to swear him again or not.

Exam. Johnson: Is the other witness a new witness?

Mr. Dixon: Yes.

Exam. Johnson: We will swear both of them.

(Witnesses sworn by Examiner.)

R. K. McCLAIN was sworn and testified as follows:

Direct examination:

Q. Are you the same R. K. McClain that testified in the previous hearing in this case?

A. I am.

Q. Are your duties and responsibilities with the Southern Railway Company the same now as they were then?

[fol. 310] A. They are.

Q. Since the last hearing, has the Southern Railway changed its dining car rules?

A. It has.

Q. I hand you a paper and ask you if that is the current rule?

A. It is.

Q. When did that rule become effective?

A. March 1, 1946.

Q. Why was the rule changed?

A. To meet the wishes of the court.

Q. It was changed to conform with the opinion of the court in Henderson versus the U. S.?

A. That is right.

Mr. Dixon: I ask that document be identified as an exhibit.

Exam. Johnson: That will be Exhibit No. 3.

(Exhibit No. 3, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, Exhibit No. 3 shows the dining car rules which are presently in effect, and which are being observed by the stewards on the Southern Railway Company today?

A. That is correct.

Q. And as you say, it became effective March 1, 1946?

A. Yes.

Q. Is any change contemplated in the dining cars of the [fol. 311] Southern Railway? I am speaking now of structural changes?

A. Yes. We had curtains for a partition so as to have separate compartments. We now have a plan for permanent partitions that will be placed in the cars.

Q. Where will those partitions be placed?

A. They will be placed between stations 1 and 2 in the body of the car.

Q. So as to separate the table reserved for colored folks from the other tables in the car?

A. That is correct.

Q. In connection with that plan, what do you propose to do with the table on the opposite side of the car?

A. That is to be made into an office for the steward.

Q. I hand you a photograph and ask you to tell us just briefly what it shows.

A. It shows in station 1 the table to the right, facing backward.

Q. Oh, I see.

A. Or facing, looking at the picture as here, to the left. The space set aside for colored patrons, and to the right looking at the picture as it is, it shows the office for the steward.

Q. Those two partitions you say are permanent partitions.

A. Permanent partitions.

Q. Approximately how high?

[fol. 312] A. Approximately five feet high.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 4.

Exam. Johnson: It will be marked as Exhibit No. 4.

(Exhibit No. 4, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, I hand you another photograph and ask you to please explain what it shows.

A. This shows the space which is set aside and reserved and assigned to dining car space for colored race.

Q. That picture shows the reserved table made up with the linen and silver in place, and the waiter standing nearby?

A. Set up for service.

Q. Set up for service?

A. Yes.

Q. And it shows also the permanent partition on the left, is that true?

A. That is correct.

Exam. Johnson: As I understand it, this partition takes the place of the curtain.

The Witness: That is correct.

Exam. Johnson: Is that right?

The Witness: Yes.

Exam. Johnson: The curtain has been removed.

The Witness: That curtain on that one car has been [fol. 313] removed. On a number of the other cars the curtains are still in place, but our plans are as the cars go through the shops to equip them in that manner.

Mr. Dixon: Mr. Examiner, I ask that the photograph showing the table made up with the waiter standing nearby be identified as Exhibit No. 5.

Exam. Johnson: It will be marked Exhibit No. 5.

(Exhibit No. 5, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, I hand you another photograph and ask you what it shows.

A. This photograph shows the space assigned not set up for service.

Q. What is the purpose of the cord?

A. The cord is shown there to keep any passengers out until it was set up and to be occupied by the colored race.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 6.

Exam. Johnson: It will be marked Exhibit No. 6 for identification.

(Exhibit No. 6, Witness McClain, marked for identification.)



By Mr. Dixon:

Q. I hand you another photograph, Mr. McClain, and ask you what it shows.

A. This picture shows the space opposite the space reserved for the colored race, which is assigned to the [fol. 314] steward as an office. He has a cash register, with space set aside for any materials and supplies which he might need at that point.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 7.

Exam. Johnson: This exhibit will be identified as Exhibit No. 7.

(Exhibit No. 7, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Why is the steward's office being placed opposite the reserved table?

A. It gives the steward an opportunity where he can see the entire body of the car, as well as the kitchen entrance, so that he can supervise the operation of the car.

Q. As I understand it, the general plan is to reserve this one table containing four seats exclusively for colored people?

A. That is correct.

Q. And the remaining tables in the car will be reserved exclusively for white people?

A. That is correct.

Q. And the steward's office will be placed opposite the reserved table?

A. That is correct.

Q. And that will be done as the cars go through the shops for repairs?

[fol. 315] A. That is our present plan.

Q. And I believe you told the Examiner that only one car has been changed so far; is that correct?

A. Only one car as I recall has been equipped so far.

Q. Do you have anything further you want to say about either our rule or the pictures?

A. No, nothing further, unless there are some further questions.

Mr. Dixon: I ask that our Exhibits 3 to 7 be received in evidence.

Exam. Johnson: Is there any objection to their receipt, Mr. Lawson?

Mr. Lawson: No objection.

Exam. Johnson: Exhibits Nos. 3 to 7, inclusive, will be received in evidence.

(Exhibits 3 thru 7, Witness McClain, received in evidence.)

Mr. Dixon: That is all on direct.

Cross examination.

By Mr. Lawson:

Q. Mr. McClain, this new regulation, Exhibit 3, and these other exhibits, representing possible structural changes in the car, as I understood you to say, were made and issued because of the decision in this case?

A. Yes.

Q. Well, weren't their issuance, and the contemplated structural changes based on the Virginia law?

[fol. 316] A. Well, we had in mind it would meet the requirements on all of the southern states.

Q. You realize this happened in Virginia, that we are concerned only with that?

A. Yes.

Q. Wasn't it then based on the Virginia statute, which you remember—well, I don't need to refresh your recollection. I suppose you remember it in general.

A. The Virginia is similar to the other states.

Q. Yes.

A. And this meets the requirements.

Q. And you had the Virginia statute in mind, as well as the decision in the Henderson case when you issued these new regulations?

A. Well, the statute of Virginia is similar to the other states, and when this decision came out, we found that this would meet the requirements of all of the states in which we operate where the segregation laws are effective.

Q. So that you did have the Virginia statute in mind?

A. Yes.

Q. Under the new regulation and structural change, you reserve only the one table?

A. That is correct.

Q. What would be the situation in the event that more than four people come into the dining car, four negroes [fol. 317] come into the dining car at one time?

A. They would be required to wait until the space was vacant and that assignment is the same as if more white passengers come than there was space for in the car, they would be required to wait until the space was vacant.

Q. Well, now, in the court's decision, and I am referring to the decision of the federal court, the statutory court, are you familiar with it, Mr. McClain?

A. I remember reading it over. There may be some points that I am not familiar with.

Q. In that decision, the court said that in the situation which I just suggested, where more negroes came in than were able to be seated immediately at the tables reserved for negroes, that equal treatment would require that those negroes be seated at other space in the diner. In the light of your prior testimony, you would not do that?

A. That is correct; we would not.

Q. So that you would then deliberately be violating this court's decision, is that right?

A. Not any more than we would against the other race. There is certain space set aside for the colored race, certain for the white race. If the dining car space assigned to white passengers was full and the colored space was empty, we would require the white passengers to wait until there was a vacancy in their assigned space.

[fol. 318] Q. Well, now, would you consider that discrimination against the white race?

A. No. Equal facilities are furnished for both races.

Q. Let us get an understanding. Do I understand you to testify that if more than four negroes came into the diner at one time, and therefore could not be seated, and there were other tables in the dining car vacant, that you would not seat the negroes at those other tables?

A. Your understanding is correct.

Q. Mr. McClain, the Virginia statute says that there shall be complete separation of the races, a partition with a door. Do you realize that this contemplated structural change does not meet that requirement?

A. No, I do not.

Q. Why, Mr. McClain, do you put the office right opposite the table reserved for negroes?

A. It is the most convenient point for the steward to be placed where he can supervise both ends of the car.

Q. Do you regard this office and the necessary and natural business transactions going on there, namely waiters going through and to, and the natural confusion attendant upon the location of this office, a burden or discrimination regarding negroes?

A. I do not.

Q. Why, then, could you not leave this office where it is, [fol. 319] and put this reserved Jim Crow table at the other end of the car?

A. Why, it is better suited to come to this end of the car. The steward at that location can better supervise the handling of the car, and this station suits better than it would at the other end of the car.

Q. Why?

A. The partition and everything fits better under this plan which we have worked out to divide the car.

Q. The dimensions of the car are the same in both ends, are they not?

A. They are.

Q. Why do you say the partitions fit better in one end of the car than the other?

A. Because of the construction of the car fits better at that end than it does at the other end.

Q. Well, now, why?

A. Due to the construction of the car.

Q. What is that construction?

A. The plans show there as to the part of the car it is necessary that the steward give attention to the waiters going and coming from the kitchen to avoid congestion there.

Q. Well, now, is it necessary to put this Jim Crow table up in that corner?

A. It fits in better there than it would at the other end. [fol. 320] Q. Well, now, that is what I am getting at, Mr. McClain. Why do you say it fits in better opposite this office than at the other end of the car?

A. Well, the conditions if it was the other end of the car, the only difference there would be that directly across the aisle would not form as good a separation as it would at the present end, where it is located.

Q. I don't understand what you mean by saying it would not form as good a separation. Will you explain that?



A. Well, opposite that table would be the white race, and it would not afford as good a separation as it does at the present end.

Q. Well, according to the Virginia statute, you would be required to completely partition off the Jim Crow table at any rate, and negroes and whites would be completely separated with that were you to conform adequately to the Virginia statute.

A. My understanding is that the present partition meets the requirements.

Q. Do you regard, Mr. McClain, negroes behind this partition and opposite this office with all of the attendant confusion, enjoying the same facilities as white people?

A. Absolutely.

Q. Do you think that it would be as quiet and peaceful and as enjoyable eating a meal behind this partition opposite the confusion of this office as it would be in the other end of the car, where neither the partition nor the office is situated?

A. I say more so, for the reason that they are more in private there than it would be to be over in the body of the car, and probably be less noisy there and less confusion than would out in the body of the car.

Q. You say private. It is enforced privacy, isn't it?

A. What?

Q. Enforced privacy?

A. Assigned space.

Q. What is the difference between that assigned space and enforced privacy?

A. Well, there might be considerable difference on that. This is assigned space, and it is equally assigned to meet the requirements of the segregation laws, and other space is assigned to the white, and this is assigned to the colored. There is no discrimination there.

Q. Excuse me. What space is assigned? What space do white people have to take.

A. The space assigned to them.

Q. What space is that?

A. That is the space other than assigned to colored.

Q. The whole diner except these four seats?

A. That is correct.

[fol. 322] Q. What is the space which negroes are compelled to take?

A. Space assigned to them.

Q. Namely, the Jim Crow table partitioned.

A. Yes.

Q. And do you regard the compulsory and enforced privacy of negroes as discriminatory?

A. No.

Q. Do you regard that sort of enforced privacy on negroes as an undue burden on interstate commerce?

A. No more than that would be on the white traveler, because they have assigned space which they have to occupy.

Q. And I just want to get this straight for the record. The assigned space of white people is the whole car, except the Jim Crow table.

A. It is the other part of the car.

Q. Well, what other parts of the car remain, other than the Jim Crow table?

A. That is all.

Q. So they have then the whole car except the Jim Crow table.

A. That is correct.

Mr. Dixon: They would not have the kitchen and the hallway and the pantry.

The Witness: That is right.

Mr. Lawson: That is right. I meant the diner.

The Witness: The colored traveler has the same advantage to that as the white traveler.

Mr. Dixon: I think we understand.

By Mr. Lawson:

Q. You testified as I recall that the steward could see the whole car better from this end, is that right?

A. That is correct.

Q. Couldn't he see it equally as well from the other end?

A. No, he could not supervise the entering and leaving of the pantry to the kitchen, as well from the upper end of the car.

Q. Mr. McClain, in reference to Exhibit No. 6, I think it is, this table here—

A. Yes.

Q. —I did not understand why the rope or cord was around that table.

A. That cord is set up there to avoid any white passengers entering that space or anybody entering that space until it is set up for service. Also you will notice that there is a cord just across the aisle which is set over the steward's space to avoid anyone entering that space.

Q. This table is located opposite the steward's office?

A. That is correct.

Q. This table, then, is for either white or colored as the situation may require?

A. No, that table is for colored, set aside. That space, even though no colored passengers entered the car for [fol. 324] service, that space is not allowed to be occupied by the white race.

Q. This then is the only table reserved?

A. That is correct.

Q. Do you know, Mr. McClain, anything about the statistics relative to increased negro travel?

Mr. Dixon: We are going to show that.

Mr. Lawson: You are going to show that?

By Mr. Lawson:

Q. Is it your feeling, Mr. McClain, that this one table adequately will accommodate the negro dining car patrons in the future?

A. It does at the present time, and we don't know what the future will hold, but we anticipate that from past history that it will be sufficient.

Q. Do you know whether or not subsequent to the issuance of this regulation of March 1946, your railroad has been sued as the result of the violation thereof?

A. I know of suits, yes.

Q. Therefore, would you say that this latest regulation is no solution to the problem?

A. We think it is a solution.

Q. Notwithstanding the lawsuits that have been filed?

A. That is right.

Q. Mr. McClain, are you a lawyer?

A. No.

Q. Are you familiar with the Supreme Court decision [fol. 325] in the Morgan case?

A. No, only in a general way.

Q. If I were to tell you that the Supreme Court of the

United States, subsequent to the ruling in this Henderson case, held that in interstate bus transportation there shall be no form of racial segregation, notwithstanding any state statute, would you say that your regulation conforms to that decision?

A. Yes, until the courts say that they do not.

Q. Well, now, my understanding is that the Supreme Court has already said that no form of racial segregation shall obtain in interstate motor bus transportation, and I have in my hand a decision of the U. S. Court of Appeals of the District of Columbia, which says the same thing regarding interstate passenger car transportation.

Mr. Dixon: That is street cars.

Mr. Lawson: No, this is Southern Railway, just recently decided. That was two weeks ago.

By Mr. Lawson:

Q. In the light of those two decisions, do you feel that your racial segregation in dining cars conforms to the court's ruling?

A. I do.

Mr. Lawson: That is all.

Redirect examination.

By Mr. Dixon:

Q. I just want to get one thing straight, Mr. Mc-[fol. 326] Clain.

On direct you testified that these new rules, effective March 1, 1946, were promulgated because of the federal court's decision in the Henderson case?

A. Yes.

Q. And that is still the reason, isn't it?

A. It is.

Q. And the fact that the state laws provide for segregation is merely incidental to this rule shown in Exhibit No. 3.

A. That is correct.

Q. In other words, the rules shown in Exhibit No. 3 were not based on the state laws, were they?

A. No, but we thought they complied with them.

Q. On cross-examination you stated that the steward from his new office space could better supervise the manage-



ment of the car, and you referred particularly to the fact that he could see into the pantry and the kitchen.

A. Yes.

Q. I am going to hand you Exhibit No. 4, and ask you whether that exhibit does not bear out your statement.

A. It does.

Q. If the steward's office were at the other end of the car, he could not see around that partition which separates the buffet from the body of the dining car, could he?

A. That is correct.

[fol. 327] Mr. Dixon: That is all I have.

Exam. Johnson: As I remember, the passengers came around the side that the steward is on.

The Witness: They came through that side, that is correct.

Exam. Johnson: The same side.

The Witness: Opposite the entrance from the pantry.

Exam. Johnson: And on the other side is where the waiters come and go from the pantry?

The Witness: Yes.

By Mr. Dixon: .

Q. Bearing on the Examiner's question, Mr. McClain, looking at Exhibit No. 4, do the passengers come around the buffet from the right or left?

A. They come from the right, this entrance.

Q. What is over to the left?

A. The entrance to the pantry.

Q. And kitchen?

A. Yes.

Q. And the steward can see that from his position there in his new office space?

A. He can.

Q. Can he not?

A. Yes.

Mr. Dixon: That is all.

Exam. Johnson: Do you have something further, Mr. Lawson?

[fol. 328] Mr. Lawson: After you.

Exam. Johnson: Mr. Lawson asked about the section reserved for the colored and for the white, and I got the im-

pression from his question that the white people were allowed to wander to any of the tables. I don't believe the record brings that out.

The Witness: No, they are allowed all other tables except this table 1.

Exam. Johnson: Yes, but I mean here, I think the record stated that they were assigned to the table in order to have all of the waiters working at once, that each waiter has a station and maybe the first one would be a white person who would be assigned to station No. 6; maybe the next one to No. 1, in order to balance.

The Witness: In other words, so they would not be overcrowded, that is right.

Exam. Johnson: I did not get the impression that a white person could go to any table he wanted to go to. Was that your question?

Mr. Lawson: That was my question. He did not answer it the way you suggested. The direct answer was they could go any place they wanted to. My experience in dining cars is that white and colored people can go anywhere they want to in the diner.

The Witness: As a general rule they are assigned space, [fol. 329] as they enter the car.

#### Recross-examination

By Mr. Lawson:

Q. White people don't have to go; if a waiter or steward takes a chair and offers it to a white person, if that white person does not want to sit there, he may go with his friends to some other table. Is that not so?

A. Pursuant to the conditions of the car. If there is no reason why they should not, the steward does not object, but if there is reason, the steward will object and say, "We would rather you would sit here for these reasons."

Q. Crowded conditions or few waiters.

A. Yes.

Q. Anywhere, a white person can sit anywhere he wants to in the diner?

A. Anywhere a space is, and there is no vacancy, and if there is no unusual condition, just the same as a colored person could enter either one of the chairs that were assigned to them in the space.

Q. Nowhere else.

A. No other space in the car except space assigned to them.

Exam. Johnson: The question came up about whether this was adequate to take care of the colored and the answer was that at the present time it would. I think the record shows that at the time this case was originally heard, the testimony was one colored to a thousand white. Wasn't [fol. 330] that correct?

Mr. Dixon: That was a mighty rough estimate. I am willing to admit that estimate was rough. We are going to show you facts.

Exam. Johnson: You are?

Mr. Dixon: Yes.

Exam. Johnson: That might be entire- different at the present time.

Mr. Lawson: I will object to any showing of facts, because the Supreme Court in Mitchell case has said volume of traffic has nothing to do with it.

Mr. Dixon: I thought you called for the facts.

Exam. Johnson: That is not what I had in mind. What I had in mind was, would this one table be adequate for the number of colored that would probably come to the diner, as compared to six additional that the white people would have.

Mr. Dixon: Six additional what?

Exam. Johnson: Tables.

Mr. Lawson: Many more than that, eight or ten more.

The Witness: There would be ten tables.

Exam. Johnson: Ten tables?

The Witness: Ten tables.

Exam. Johnson: Ten to one.

The Witness: Ten to one.

Mr. Lawson: My point is that any testimony regarding [fol. 331] the number of negro patrons is inadmissible by reason of the Mitchell case.

Exam. Johnson: You brought the question up there yourself, Mr. Lawson, of whether that would be adequate to take care of the colored.

Mr. Lawson: Yes, but that does not open up the whole question of statistics. That was simply one question for which no basis was laid, so my point is that as a matter of evidence, the whole record is not opened up to testify

regarding volume of traffic, in the light of the decision in the Mitchell case:

May I ask Mr. McClain a couple of other questions?

By Mr. Lawson:

Q. You said you thought these new regulations complied with the Virginia statute, is that right?

A. That is right.

Q. So that you issued these new regulations not alone on the Henderson case decision, but in what you thought was the conformance to the Virginia statute.

A. Well, these new instructions were issued due to the decisions, of the courts, but that decision——

Mr. Dixon: You said courts.

The Witness: The courts, yes.

Mr. Dixon: The court, c-o-u-r-t.

The Witness: The court, yes. But even with the instructions we issued we feel that they comply with the Virginia statute.

[fol. 332] Q. So that at all times you have had in your mind the Virginia statute.

A. Not necessarily. No, we set it up the first time, which we thought would take care of the situation. The courts ruled differently and we changed the rule to conform to the court's decision.

Q. Mr. McClain, I think this is basic towards this whole situation, and I would like to have you give me a categorical answer as to whether or not you had in mind the Virginia statute when these new regulations were issued.

A. No.

Q. You did not?

A. No.

Q. So that you issued these regulations in disregard of the Virginia statute?

A. We were of the opinion that the new regulations complied with the Virginia statute.

Q. Well, now, I understood you to say just a moment ago that you did not have the Virginia statute in mind when you issued these regulations.

A. That is correct.

Q. And yet you now say that you had it in mind.

A. I say this——

Q. You thought that they conformed.



A. I say this, that we had our instructions with reference [fol. 333] to the handling of the segregation of the races. When this case came up, the courts ruled that our practice was not right. Then we modified the rules and changed them to such an extent that we believe it meets the requirements.

Mr. Dixon: Of what?

The Witness: Of the court.

By Mr. Lawson:

Q. Of the court?

A. Yes.

Q. Well, now, the Virginia statute says that there shall be a permanent—I don't intend to be quoting, but there should be a solid or permanent partition, is that right?

A. I am not familiar with that.

Q. If the Virginia statute says that, why, then, do you now change from the use of the curtain unless you are doing it in conformity with the statute.

A. We changed from the use of the curtain to this partition because we thought it would be more satisfactory to everybody. The curtain, we understand, would be the same as the partition, but we intend to change the cars, because we believe it would be more satisfactory to have the partitions.

Q. Why?

A. Because it would probably be better than the curtain.

Q. Why?

A. Probably for several reasons. They are easier to keep clean, and they are more permanent, won't require so much [fol. 334] repair and attention.

Q. And that of course is for the convenience of the railroad?

A. Absolutely.

Mr. Dixon: Do they look better?

The Witness: They look better. The appearance is better.

By Mr. Lawson:

Q. Mr. McClain, you say that these regulations were made for the convenience of the railroad?

A. These regulations—which regulations?

Q. Regarding the——

A. The change in partition?

Q. Yes, and setting up of the office.

A. Yes.

Q. Did you consider the comfort of the passengers when you made these regulations?

A. Yes. We feel that the use is just as comfortable as the curtains, and just——

Q. And just as convenient?

A. Yes.

Q. Do I understand you then to testify that a negro diner car patron behind this partition, sitting on one of these end tables where waiters are going and coming and the noise of the cash register, and so forth, that that is just as comfortable and convenient as the white patron sitting at the end of the car where none of that confusion is going on? [fol. 335] A. Absolutely.

Q. You testified that you took into consideration the convenience and comfort of negro patrons when you set up these regulations, is that right?

A. I said yes, in setting up this space, we picked the space that would best serve everybody.

Q. Wherein specifically does the new regulation increase the comfort and convenience of negro passengers?

A. Similar to the other stations, the same space.

Q. Well, now, specifically point out the similarities between Negro patrons and white patrons.

A. They have space assigned to them. The white traffic has space assigned to them. This space is like accommodation.

Q. Do you regard this enforced—or this assigned space, you call it, opposite this office equal accommodations as white patrons in the body of the diner?

A. Absolutely.

Q. One final question that I think I have asked, but it has not been specifically answered. Do you regard the new regulations as an improvement so far as negro patrons are concerned?

A. Yes.

Q. How?

A. The space would be available at all times. I should say this, space is definitely assigned to the colored patrons, [fol. 336] which is to be occupied by them, only.

Q. Space for how many patrons?

A. Four.

Q. Four only?

A. Four only.

Mr. Lawson: That is all.

Mr. Dixon: That is all.

Exam. Johnson: Witness excused.

(Witness excused.)

Exam. Johnson: Call your next witness.

F. C. THOMAS was sworn and testified as follows:

Exam. Johnson: You have already been sworn?

The Witness: Yes.

Direct examination.

By Mr. Dixon:

Q. Will you state your name, please?

A. F. C. Thomas.

Q. What is your occupation?

A. Superintendent of Dining Cars, Southern Railway, Atlanta, Georgia.

Q. How long have you been in the dining car department of the Southern?

A. It will be 28 years December 20 of this year.

Q. Mr. Thomas, did you make a test to determine the number of white and colored passengers using dining car [fol. 337] service on Southern Railway between Atlanta and Washington?

A. I did.

Q. I hand you an exhibit which I will ask be marked for identification as No. 8.

Exam. Johnson: It will be marked for identification.

(Exhibit No. 8, Witness Thomas, marked for identification.)

By Mr. Dixon:

Q. I will ask you to please tell us what it shows.

Mr. Lawson: Mr. Examiner, at this point I wish to register formally my objection to the admission of this

testimony, and I do that on the basis of the Mitchell case, which says that volume of traffic has nothing to do with the situation of this kind.

Exam. Johnson: Mr. Lawson's objection will be shown in the record. Go ahead.

By Mr. Dixon:

Q. Go ahead, Mr. Thomas.

A. Well, this shows the number of colored patrons between the heaviest points on our railroad, which is between Washington and Atlanta. That is a period of ten days, May 14 to 24, inclusive.

Q. What year?

A. Of 1945.

Q. Just tell us the result down at the bottom, how many. I will ask you how many meals were served during that period?

[fol. 338] A. Well, there was a total.

Q. The total number of meals served.

A. 37,615.

Q. How many of those served to colored service people?

A. Colored service?

Q. Yes.

A. 706.

Q. How many were served to colored civilians?

A. 446.

Q. And how many were served to white passengers?

A. To white passengers.

Q. In other words, in order to get the number of whites, you would have to subtract 1,152 from 37,615, is that right?

A. That is correct.

Mr. Lawson: Wouldn't you have to subtract all of these figures; you see, all of these are negroes.

Mr. Dixon: That is the total of 1,152 colored served.

By Mr. Dixon:

Q. Out of 37,615?

A. Yes, out of 37,615 passengers served between these dates, during this ten day period.

Q. Mr. Thomas, that test was made for what purpose, do you remember?



A. Just to ascertain the number of colored passengers we were serving, actually serving on the trains between the points.

[fol. 339] Q. Was that exhibit introduced in any other case?

A. Yes, sir, it was.

Q. Do you remember that?

A. Yes, sir.

Q. Do you remember the name of that case?

A. The Mays case.

Q. And that is the case before the ICC?

A. That is correct.

Q. Since that time have you made a further test along the same lines?

A. I have.

Q. I hand you a further exhibit, which I ask to have marked for identification as No. 9.

Exam. Johnson: It will be marked for identification.

(Exhibit No. 9, Witness Thomas, marked for identification.)

By Mr. Dixon:

Q. What does that exhibit show in a general way?

A. This exhibit shows a check for ten day period October 1 to October 10, inclusive, 1946, between Washington and Atlanta, Georgia.

Q. And during that period how many meals were served to colored service people?

A. Colored service people, 149.

Q. How many to colored civilians?

A. 723.

[fol. 340] Q. And how many to white passengers?

A. 19,917.

Q. Are these two exhibits true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Were they made under your supervision and direction?

A. That is correct.

Mr. Dixon: I ask that the exhibits be received.

Exam. Johnson: The other pages are just the breakdown?

Mr. Dixon: That is right.

Exam. Johnson: Of the summaries?

The Witness: That is the daily.

Exam. Johnson: The same thing.

The Witness: The daily record, yes, sir.

Exam. Johnson: Exhibits 8 and 9 are received in evidence.

(Exhibits 8 and 9, Witness Thomas, received in evidence.)

Mr. Lawson: I did not register my objection to Exhibit 9.

Exam. Johnson: The same objection?

Mr. Lawson: The same objection, and I want to amend both objections by saying the reason for, one, the decision in the Mitchell case, and second, the decision in the Henderson case, which requires that these reservations for negroes should be absolute.

Mr. Dixon: As I understood Mr. McClain, the reservation [fol. 341] for negroes is absolute.

Mr. Lawson: The reservations are for only four. We contend there is a difference.

Mr. Dixon: That is all I have on direct.

#### Cross-examination.

By Mr. Lawson:

Q. Mr. Thomas, did you yourself compile this record?

A. It was under my supervision. Each steward as he went out was told to give us this record of his division, and they were turned in at the end of each trip.

Q. But you yourself did not make any part of this record.

A. I supervised the making of the record.

Q. Are you testifying from any original notes taken during any part of this?

A. Oh, no, this just is the record.

Q. Who compiled this record?

A. This is compiled by my office force.

Q. And they gave it to you?

A. That is right.

Q. As you testified?

A. Yes.

Q. Take page 2 of this record, of the photostatic record.

A. Of the photostatic record?

Q. The May 1945 record.

A. All right.

[fol. 342] Q. Who, if you know, compiled the second page?

A. That was compiled in my office.

Q. I mean what steward?

A. Each steward turned in his report.

Q. Well, what steward turned in the record as indicated on page 2?

A. The various stewards that were running at that particular time.

Q. What were their names?

A. I don't have the record of the names. I would have to get that.

Q. Is any one of those stewards here?

A. None of them.

Q. And that is true of all of these, of this whole report?

A. That is correct.

Q. Now, calling your attention to the Exhibit 9, the same is true?

A. The same is true, that is correct.

Q. So from your own personal knowledge, you know nothing about the accuracy or method of obtaining these reports, do you?

A. Well, the stewards were instructed to know.

Q. No, if you just answer my question, then you can explain.

A. That is true.

Q. Answer yes or no.

[fol. 343] A. That is correct.

Q. I mean do you know of your own personal knowledge the method of compilation of this report, and their accuracy.

A. I do know how it is done, because each steward turned in his record showing the number of colored served.

Q. But you yourself have no personal knowledge.

A. I was not on the car. I could not possibly be.

Mr. Lawson: That is all.

Redirect examination.

By Mr. Dixon:

Q. Let me ask you a couple of questions.

How did you instruct the stewards to prepare these reports?

A. Well, each steward before leaving was instructed—

Q. Before leaving where?

A. Before leaving his home terminal—to give us a record of the number of colored served.

Q. And the number of whites?

A. And the number of whites served; the number of colored and white served.

Q. How about that military and civilian business? Was he told to do that?

A. He was told to separate the military and civilian.

Q. Then what happened? How did he give you that report?

A. He gave it to me in writing and gave it to me as he turned his reports in.

[fol. 344] Q. And did he send the meal checks to you?

A. No, sir. The meal checks go to the auditor of the passenger accounts.

Q. So he just made an independent report?

A. Made an independent report, and enclosed the reports.

Q. And sent it to you at Atlanta? And do you have any rough idea of how many stewards compiled these reports during the ten day period?

A. There is some approximately 18 or 20 stewards.

Q. You could not be with all of them at the same time?

A. I would not possibly; approximately 20 stewards.

Q. And when the reports were received at Atlanta, what did you tell the office force?

A. To take these reports and make a record of them, and put them in this form here.

Q. And did you make any check on the office force to see if they were carrying out your instructions?

A. Yes, sir, I did; I certainly did.

Q. As you testified in the beginning, you think they are true and correct?

A. I think they are correct. I see no reason for not being correct.

Mr. Dixon: That is all I have.

Recross-examination.

By Mr. Lawson:

Q. You say you instructed these stewards; orally or in [fol. 345] writing?

A. They were instructed orally.

Q. And they brought in their reports in writing?



A. That is correct. Each steward, as he left his home terminal was reminded of this, to do this.

Q. And do you have any of the original reports turned in by any of the stewards with you now?

A. I do not.

Q. You do not, therefore, testify from any of those original reports?

A. I testify from this report here.

Q. But not—

A. That is correct.

Q. But not from the original reports, just for the record.

A. Just for the record, that is correct. That is correct.

Mr. Lawson: I make another objection which I could not of course have made hitherto for the reason that I did not have this testimony.

I object to the admission of all of both of these reports for two other reasons than those I have previously suggested; one, it is clearly hearsay, and second, it is certainly not in conformity to the best evidence rule. I seriously urge those objections in the light of the testimony of Mr. Thomas.

Exam. Johnson: As I understand, Mr. Thomas, you gave [fol. 346] the instructions to the various stewards to bring in certain information.

The Witness: That is correct, as outlined here, the number of colored separating the colored military from the civilian; also showing the number of whites served on this trip.

Exam. Johnson: This is in answer to your inquiry for certain information?

The Witness: That is correct.

Exam. Johnson: And you being the superintendent, of course.

The Witness: It came under my supervision.

Exam. Johnson: And it is usual for you to do this?

The Witness: That is correct.

Exam. Johnson: Various kinds of reports?

The Witness: Various reports we get are handled in this same manner.

Exam. Johnson: The objection is overruled. I think that is all right. It will be shown in the record, however.

Mr. Lawson: The overruling of my objection will be shown?

Exam. Johnson: Yes. Anything further?

Mr. Dixon: No.

Mr. Lawson: I just wanted to briefly state my position in the light of the decision of the statutory court.

[fol. 347] Mr. Dixon: Mr. Examiner, may we go off the record for a moment?

Exam. Johnson: Yes, off the record.

(Discussion off the record.)

Exam. Johnson: On the record.

Mr. Lawson: This is no attempt to argue the case, because we shall file a brief and argue the case before the Commission. However, by reason of the fact that we did not at this time offer any testimony, I wanted to put in the record our position, which is, namely, that in view of the decision in the Henderson case, and in view of the very recent decision in the Morgan case, and in view of the decision—

Exam. Johnson: What is the citation of the Morgan case?

Mr. Lawson: I only have it in advance sheets. It is not in the reports yet, I think.

Exam. Johnson: You can put that in the brief anyway.

Mr. Lawson: I will have it in the brief. It is Morgan against the Commonwealth of Virginia.

The other case of the U. S. Court of Appeals is Matthews et al. versus the Southern Railway.

Our position is simply this, that if as in the Morgan case it be said by the Supreme Court, as it was, that any sort of racial segregation in interstate bus transportation is a burden on commerce, and if as the Court of Appeals [fol. 348] of the District of Columbia has said, any sort of racial segregation in interstate passenger transportation is a burden on interstate commerce, then we feel that any sort of segregation based on race in interstate dining-car transportation is likewise a burden on interstate commerce, and that therefore the new regulations and structural changes issued and contemplated by the Southern Railway are based admittedly on race, and therefore a burden on interstate commerce.

Exam. Johnson: Briefs will be due November 14.

Mr. Lawson: Might we agree to allow that until December 1. I have a case out of town which will take some few days, and I would not have to bother with any further request. Is that agreeable, December 1?

**Exam. Johnson:** All right, I will grant that; December 1. Anything further? If not, the hearing is closed.

(At 10:30 o'clock p.m., the hearing was closed.)

[fol. 349] I.C.C. Docket No. 28895. Witness: McClain.  
Exhibit No. 3.

**SOUTHERN RAILWAY SYSTEM**  
Office of Assistant Vice-President

Washington, D. C., February 19, 1946.

Transportation Department Circular No. 142. Cancelling instructions on this subject, dated July 3, 1941, and August 6, 1942.

**SUBJECT:** Segregation of White and Colored Passengers in Dining Cars.

**To:** Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

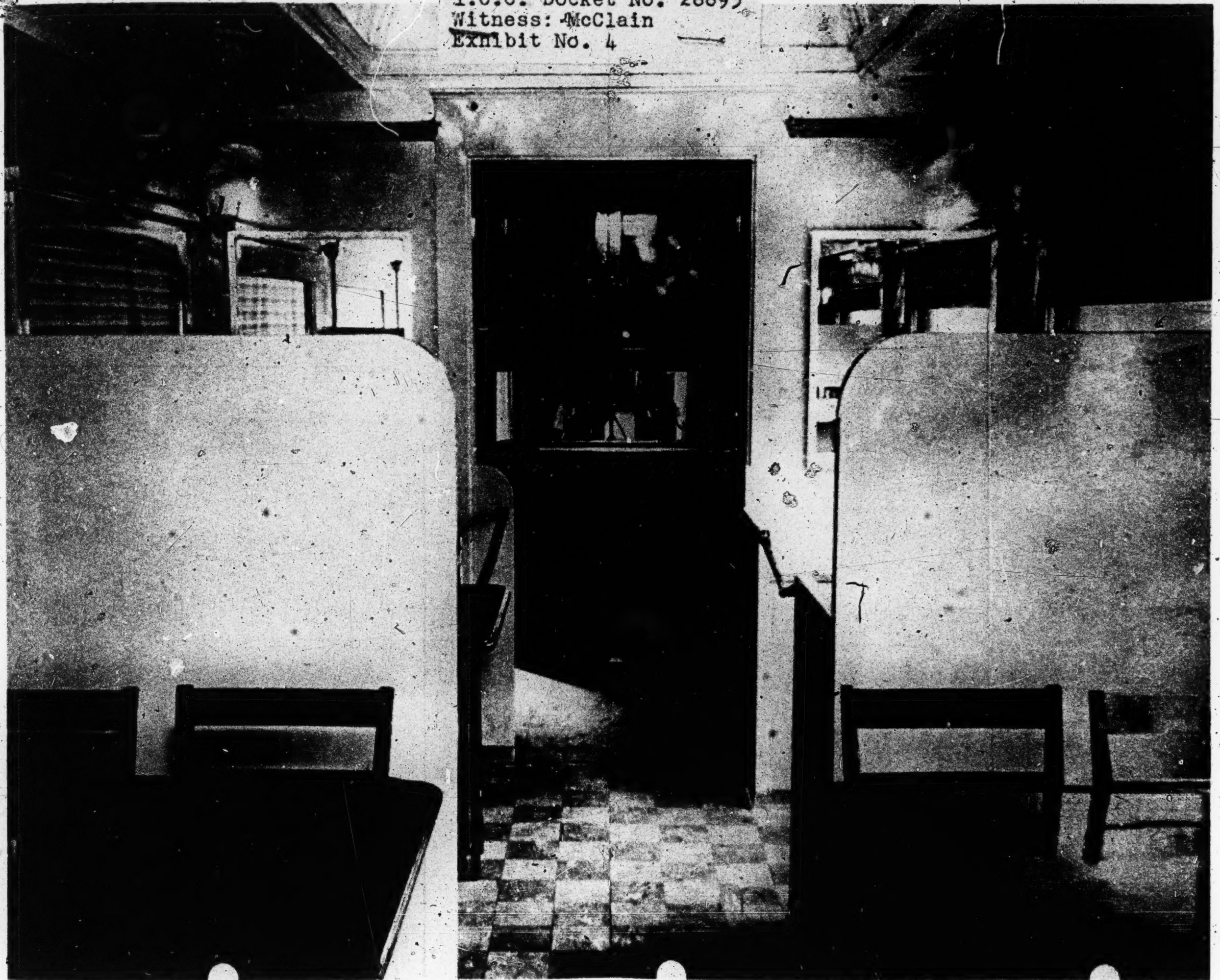
(4) These rules become effective March 1, 1946.

R. K. McClain, Assistant Vice-President.

(Here follow 4 Photolithographs—side folios 350-353)



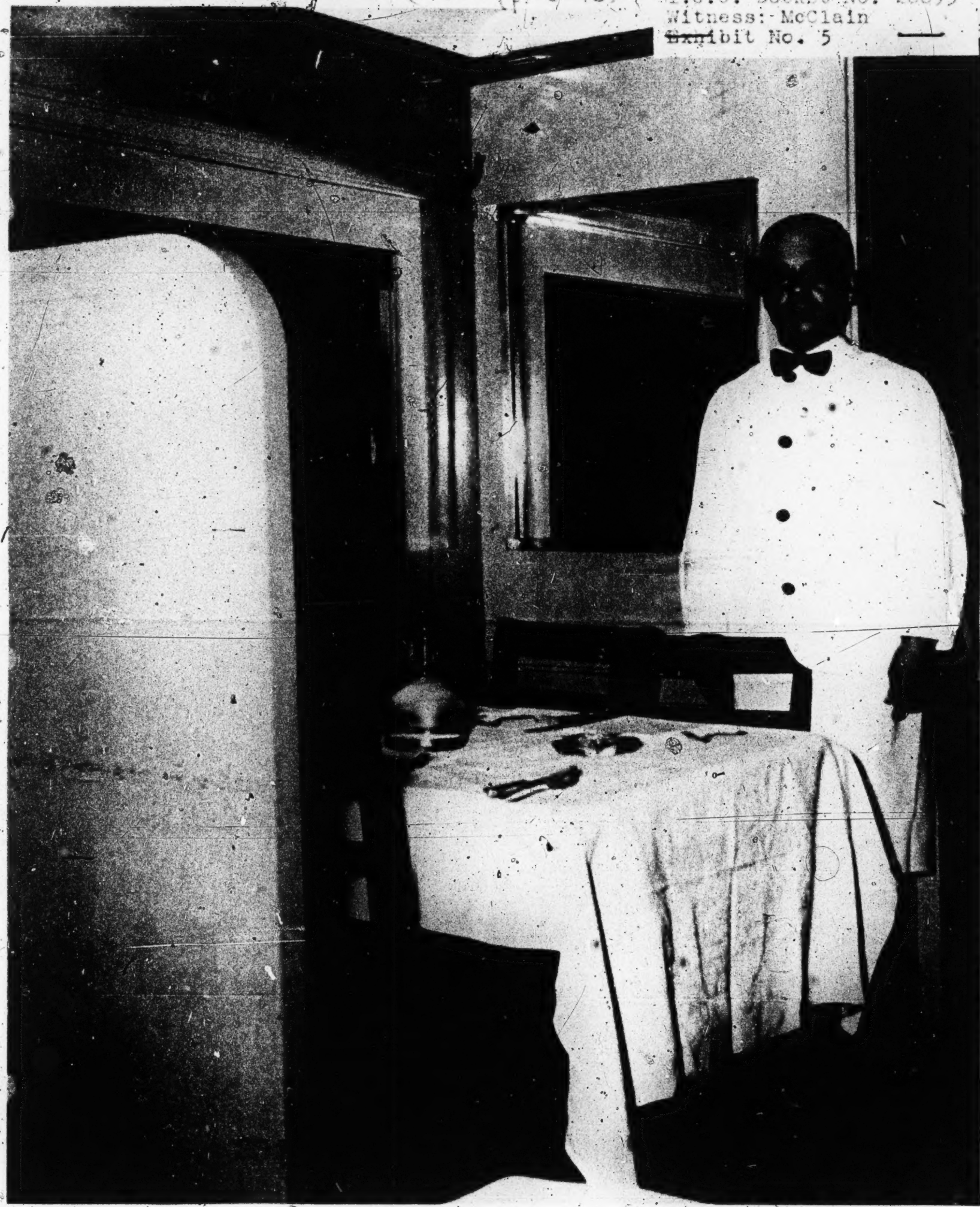
I.C.C. Docket No. 28895  
Witness: McClain  
Exhibit No. 4





(341) (P. 2/43)

I.C.C. Docket NO. 28895  
Witness: McClain  
Exhibit No. 5

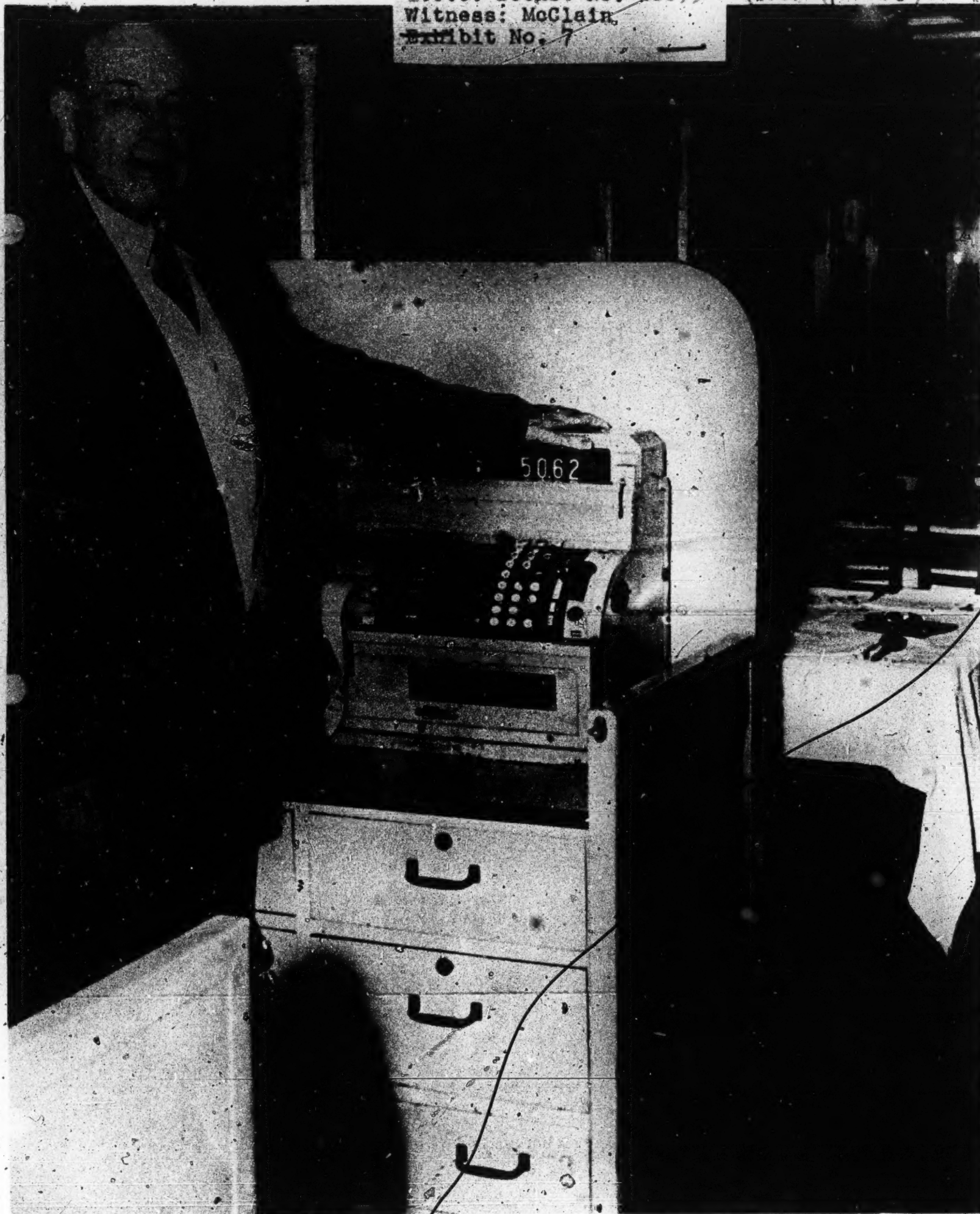


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I.C.C. Docket No. 28895  
Witness: McClain  
Exhibit No. 6







[fol. 354]

J. C. C. Docket No. 28895

Witness: Thomas

EXHIBIT No. 8

Statement of Meals Served to All Passengers and Meals Served to Negro Passengers, Military and Civilian, in Southern Railway Dining Cars on Southern's Passenger Trains Between Washington, D. C. and Atlanta, Georgia for 11 Days, May 14-24, 1945 Inclusive.

	Diner	Trains	Meals	Negroes			Total All Meals Served
				Military	Civilian	Total	
May 14	17	16	31	93	63	156	2,913
" 15	18	18	32	71	47	118	3,901
" 16	18	17	33	55	34	89	3,669
" 17	18	17	33	80	39	119	3,300
" 18	18	17	33	60	35	95	3,310
" 19	18	17	33	72	44	116	3,485
" 20	18	17	33	50	51	101	3,123
" 21	18	17	33	68	35	103	3,265
" 22	18	17	33	52	30	82	3,591
" 23	18	17	33	40	44	84	3,539
" 24	18	17	33	65	24	89	3,519
Totals	196	187	360	706	446	1,152	37,615

Total meals served 11 days..... 37,615  
 Total meals served to negroes..... 1,152=3.06% of whole  
 Total meals served to negro civilians..... 446=1.19% " "  
 Total meals served to negro military..... 706=1.88% " "



[fol. 355]

## Meals Between Washington and Atlanta, May 14, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	2	2	4	251
3302	47	B	0	4	4	204
3158	37	B	2	3	5	79
3170	38	L	1	1	2	92
3159	1/33	B	6	2	8	141
"	"	L	6	3	9	102
"	"	D	0	2	2	87
3162	30	D	2	0	2	69
3168	36	B	0	2	2	139
"	36	L	0	4	4	78
"	"	D	4	2	6	102
3146	1/34	B	2	2	4	58
"	"	L	4	3	7	66
"	"	D	6	4	10	109
3148	2/33	B	4	3	7	49
"	"	L	2	1	3	24
"	"	D	4	1	5	28
3163	40/19	L	0	4	4	56
"	"	D	0	2	2	113
3155	29	B	7	6	13	145
"	"	L	5	4	9	85
3156	2/34	B	10	1	11	61
"	"	L	3	2	5	57
"	"	D	0	0	0	110
3164	31	D	6	0	6	58
3140	39	B	0	0	0	46
3153	35	L	4	0	4	39
"	"	D	2	1	3	129
3169	"	L	5	1	6	76
"	"	D	3	1	4	181
3157	30	B	4	2	6	79
17	16	31	93	63	156	2,913

[fol. 356] ●

## Meals Between Washington and Atlanta, May 15, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	0	0	0	202
3302	48	D	0	3	3	172
3301	48	B	3	0	3	229
3166	37	B	2	4	6	115
3167	38	L	1	0	1	106
"	"	D	4	0	4	196
3154	30	D	4	3	7	77
3162	36	B	5	2	7	175
"	"	L	3	1	4	147
"	"	D	0	1	1	130
3168	1/33	B	0	1	1	100
"	"	L	4	4	8	77
"	"	D	1	2	3	67
3146	2/33	B	3	1	4	98
"	"	L	2	3	5	101
"	"	D	4	2	6	53
3148	1/34	B	0	0	0	70
"	"	L	1	1	2	111
"	"	D	1	1	2	138
3163	40	L	2	2	4	68
"	"	D	3	4	7	109
3155	2/34	L	6	1	7	83
3164	29	B	4	0	4	213
"	"	L	2	2	4	148
"	"	D	4	1	5	167
3156	31	D	2	2	4	54
3153	30	B	3	4	7	100
"	"	L	4	1	5	105
3157	35	D	3	1	4	185
3169	35	L	0	0	0	118
"	"	D	0	0	0	138
3142	39	B	0	0	0	49
18	18	32	71	47	118	3,901

[fol. 357]

## Meals Between Washington and Atlanta, May 16, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	0	0	186
3301	47	B	1	2	3	216
3302	48	B	2	1	3	222
3158	38	L	4	1	5	104
"	"	D	0	0	0	183
3170	37	B	3	2	5	120
3154	36	B	1	2	3	134
"	"	L	1	0	1	89
"	"	D	1	2	3	68
3159	30	D	2	1	3	62
3162	1/33	B	2	1	3	99
"	"	L	0	2	2	71
"	"	D	3	3	6	69
3146	1/34	B	1	3	4	70
"	"	L	4	2	6	76
"	"	D	0	0	0	154
3148	2/33	B	2	1	3	134
"	"	L	3	1	4	95
"	"	D	0	1	1	69
3163	40	L	4	2	6	46
"	"	D	1	1	2	57
3155	31	D	2	1	3	58
3156	29	L	2	1	3	179
"	"	D	1	1	2	184
3164	2/34	B	2	1	3	135
"	"	L	3	0	3	144
3164	"	D	0	1	1	161
3153	35	L	0	0	0	38
"	"	D	2	1	3	104
3157	35	L	2	0	2	71
"	"	D	1	0	1	152
3169	30	B	3	0	3	81
3140	39	B	2	0	2	38
18	17	33	55	34	89	3,669

[fol. 358]

## Meals Between Washington and Atlanta, May 17, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	4	3	7	226
3301	48	D	3	0	3	183
3302	47	B	3	0	3	205
3166	38	L	1	2	3	107
"	"	D	0	1	1	173
3167	37	B	3	4	7	127
3154	1/33	B	2	2	4	100
"	1/33	L	2	4	6	65
"	1/33	D	1	0	1	56
3159	36	B	1	0	1	180
"	"	L	1	1	2	118
"	"	D	3	1	4	111
3168	30	D	2	0	2	53
3146	2/33	B	2	0	2	87
"	"	L	1	0	1	67
"	"	D	0	0	0	50
3148	1/34	B	4	0	4	45
"	"	L	6	0	6	57
"	"	D	8	0	8	117
3163	40	L	2	0	2	48
"	"	D	4	0	4	78
3155	29	L	0	2	2	98
"	"	D	1	2	3	95
3156	2/34	B	1	0	1	144
"	"	L	2	4	6	126
"	"	D	4	2	6	131
3164	31	D	2	1	3	44
3153	35	L	6	2	8	60
"	"	D	2	1	3	116
3169	35	L	3	1	4	29
"	"	D	2	3	5	81
3157	31	B	4	2	6	72
3142	39	B	0	1	1	51
18	17	33	80	39	119	3,300



[fol. 359]

## Meals Between Washington and Atlanta, May 18, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	2	1	3	226
3301	48	B	4	0	4	234
3302	48	D	2	0	2	173
3158	37	B	1	6	7	97
3170	38	L	1	3	4	114
"	"	D	3	0	3	199
3150	1/33	B	2	0	2	104
"	"	L	3	2	5	62
"	"	D	1	2	3	78
3162	30	D	1	2	3	57
3168	36	B	4	0	4	178
"	"	L	2	0	2	102
"	"	D	3	2	5	88
3146	1/34	B	1	0	1	80
"	"	L	0	0	0	27
"	"	D	0	2	2	125
3148	2/33	B	6	0	6	86
"	"	L	2	0	2	56
"	"	D	1	0	1	30
3163	40	L	1	0	1	51
"	"	D	0	0	0	69
3155	2/34	B	4	0	4	98
"	"	L	2	0	2	95
"	"	D	4	2	6	154
3156	31	D	0	3	3	89
3164	29	B	1	2	3	233
"	"	L	1	1	2	99
3153	30	B	2	1	3	43
3157	35	L	4	1	5	19
"	"	D	1	2	3	46
3169	"	L	0	1	1	54
"	"	D	1	2	3	85
3140	39	B	0	0	0	59
18	17	33	60	35	95	3,310

[fol. 360]

## Meals Between Washington and Atlanta, May 19, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	0	0	176
3301	47	B	0	0	0	195
3302	48	B	2	0	2	234
3166	37	B	3	1	4	132
3167	38	L	4	2	6	125
"	"	D	2	4	6	201
3154	30	D	4	2	6	77
3162	36	B	3	0	3	178
"	"	L	1	0	1	132
"	"	D	1	2	3	79
3168	1/33	B	2	1	3	97
"	"	L	1	1	2	74
"	"	D	2	4	6	46
3146	2/33	B	3	0	3	78
"	"	L	4	2	6	65
"	"	D	1	2	3	60
3148	1/34	B	2	0	2	31
"	"	L	2	0	2	61
"	"	D	1	0	1	81
3163	40	L	5	4	9	68
"	"	D	2	2	4	94
3155	31	D	3	1	4	75
3156	29	B	1	4	5	191
"	"	L	1	2	3	116
3164	2/34	B	3	0	3	71
"	"	L	2	1	3	85
"	"	D	2	1	3	120
3153	35	L	1	0	1	89
"	"	D	3	2	5	129
3157	35	L	4	4	8	71
"	"	D	2	2	4	101
3169	30	B	2	0	2	80
3142	39	B	3	0	3	73
18	17	33	72	44	116	3,485

[fol. 361]

## Meals Between Washington and Atlanta, May 20, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	4	0	4	230
3301	47	B	0	0	0	59
3302	48	D	0	0	0	116
3158	38	L	0	0	0	118
"	"	D	1	0	1	176
3170	37	B	2	0	2	139
3154	36	B	3	4	7	221
"	"	L	2	1	3	131
"	"	D	3	3	6	84
3159	30	D	1	2	3	60
3162	1/33	B	4	2	6	96
"	"	L	2	2	4	73
"	"	D	3	4	7	59
3146	1/34	B	2	1	3	71
"	"	L	2	1	3	40
"	"	D	1	1	2	92
3148	2/33	B	2	3	5	98
"	"	L	4	2	6	60
"	"	D	0	2	2	45
3163	40	L	0	1	1	59
"	"	D	2	1	3	103
3155	29	B	1	2	3	212
"	"	L	0	4	4	93
3156	2/34	B	0	2	2	106
"	"	L	0	0	0	70
"	"	D	0	2	2	112
3164	31	D	1	0	1	46
3153	35	L	2	3	5	51
"	"	D	2	0	2	75
3169	35	L	2	0	2	28
"	"	D	2	3	5	59
3157	30	B	2	3	5	79
3140	39	B	0	0	0	62
18	17	33	50	51	101	3,123

[fol. 362]

## Meals Between Washington and Atlanta, May 21, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	0	0	0	198
3301	48	B	10	2	12	243
3302	48	D	0	0	0	170
3166	37	B	0	2	2	102
3167	38	L	2	1	3	106
"	"	D	4	3	7	98
3154	1/33	B	1	2	3	127
"	"	L	1	2	3	93
"	"	D	4	4	8	61
3159	56	B	3	0	3	136
"	"	L	2	2	4	104
"	"	D	4	2	6	65
3168	30	D	1	1	2	148
3146	2/33	B	1	1	2	37
"	"	L	0	0	0	51
"	"	D	1	0	1	63
3148	1/34	B	0	0	0	32
"	"	L	0	3	3	46
"	"	D	2	2	4	80
3163	40	L	2	0	2	48
"	"	D	4	0	4	94
3156	31	D	2	0	2	48
3164	29	B	4	1	5	138
"	"	D	2	1	3	70
3155	2/34	B	3	4	7	108
"	"	L	1	2	3	118
"	"	D	4	0	4	156
3153	35	L	2	0	2	114
"	"	D	2	0	2	134
3157	35	L	2	0	2	20
"	"	D	0	0	0	103
3169	30	B	4	0	4	110
3142	39	B	0	0	0	44
18	17	33	68	35	103	3,265



[fol. 363]

## Meals Between Washington and Atlanta, May 22, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	1	1	169
3301	47	B	0	0	0	225
3302	48	B	0	0	0	217
3158	37	B	2	4	6	126
3170	38	L	2	6	8	114
3170	38	D	2	0	2	163
3159	1/33	B	2	0	2	136
3159	1/33	L	1	2	3	104
3159	1/33	D	1	1	2	65
3162	30	D	0	0	0	90
3168	36	B	2	2	4	179
3168	36	L	4	1	5	114
3168	36	D	2	0	2	87
3146	1/34	B	2	0	2	18
3146	1/34	L	4	0	6	36
3146	1/34	D	4	2	6	117
3148	2/33	B	2	0	2	85
3148	2/33	L	1	0	1	58
3148	2/33	D	1	1	2	46
3163	40	L	0	1	1	103
3163	40	D	1	0	1	133
3155	31	D	1	0	1	65
3156	29	B	3	0	3	190
3156	29	L	0	0	0	136
3164	2/34	B	2	1	3	156
3164	2/34	L	0	2	2	72
3164	2/34	D	0	0	0	138
3153	35	L	4	2	6	21
3153	35	D	2	0	2	59
3157	35	L	2	2	4	56
3157	35	D	4	0	4	118
3169	30	B	1	0	1	129
3140	39	B	0	0	0	66
18	17	33	52	30	82	3,591

[fol. 364]

## Meals Between Washington and Atlanta, May 23, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	0	0	0	235
3301	48	D	0	0	0	183
3302	47	B	4	4	8	210
3158	38	L	2	0	2	157
3158	38	D	2	0	2	157
3166	37	B	1	4	0	100
3159	30	D	1	1	2	60
3162	36	B	2	1	3	200
3162	36	L	2	2	4	165
3162	36	D	4	2	6	115
3168	1/33	B	0	2	2	82
3168	1/33	L	0	4	4	83
3168	1/33	D	2	3	5	41
3146	2/33	B	1	2	3	96
3146	2/33	L	1	1	2	56
3146	2/33	D	1	4	5	58
3148	1/34	B	3	1	4	99
3148	1/34	L	2	1	3	103
3148	1/34	D	2	2	4	152
3163	40	L	0	2	2	99
3163	40	D	0	1	1	148
3155	29	B	1	1	2	181
3155	29	L	1	0	1	110
3156	2/34	B	0	0	0	62
3156	2/34	L	0	2	2	58
3156	2/34	D	0	0	0	67
3164	31	D	0	0	0	50
3153	35	L	1	0	1	60
3153	35	D	1	0	1	126
3169	35	L	2	0	2	25
3169	35	D	2	2	4	68
3157	30	B	2	2	4	93
3142	39	B	0	0	0	40
18	17	33	40	44	84	3,539

[fol. 365]

## Meals Between Washington and Atlanta, May 24, 1945

Colored Passengers Served						Total
Diner	Train	Meal	Military	Civilian	Total	All Meals Served
3300	47	B	4	4	8	209
3301	48	B	0	0	0	246
3302	48	D	0	0	0	184
3166	38	L	1	2	3	125
3166	38	D	1	2	3	197
3170	37	B	2	0	2	101
3154	30	D	2	0	2	84
3159	36	B	0	0	0	258
3159	36	L	2	2	4	94
3159	36	D	4	1	5	101
3162	1/33	B	2	1	3	113
3162	1/33	L	1	1	2	90
3162	1/33	D	1	1	2	75
3146	1/34	B	3	0	3	86
3146	1/34	L	2	0	2	68
3146	1/34	D	2	2	4	110
2148	2/33	B	2	0	2	59
3148	2/33	L	2	0	2	56
3148	2/33	D	4	0	4	47
3163	40	L	2	0	2	65
3163	40	D	2	0	2	119
3155	2/34	B	2	0	2	96
3155	2/34	L	1	0	1	88
3155	2/34	D	1	0	1	112
3156	31	D	2	0	2	47
3164	29	B	0	0	0	201
3164	29	L	0	0	0	75
3153	30	B	4	0	4	67
3157	35	L	6	0	6	27
3157	35	D	4	0	4	90
3169	35	L	0	2	2	85
3169	35	D	4	4	8	101
3140	39	B	2	2	4	43
18	17	33	65	24	89	3,519

[fol, 366]

I.C.C. Docket No. 28895

Witness: Thomas

EXHIBIT No. 9

Statement Showing Number of White and Colored Passengers Served Between  
Atlanta, Ga., and Washington, D. C., During Period Oct. 1-10, Inc., 1946

## Number Meals Served

Date	Military Colored	Civilian Colored	White	Total
Oct. 1.....	14	75	2,249	2,338
2.....	35	88	1,990	2,113
3.....	26	103	1,898	2,027
4.....	12	58	2,060	2,130
5.....	14	67	2,561	2,642
6.....	17	67	2,322	2,406
7.....	2	57	1,797	1,856
8.....	14	83	1,742	1,839
9.....	9	72	1,633	1,714
10.....	6	53	1,665	1,724
Total.....	149	723	19,917	20,789

	Percent.
Military Colored.....	.72
Civilian Colored.....	3.48
White.....	95.80
Total.....	100.00



[fol. 367]

**Colored and White Passengers Served Between Washington and Atlanta  
October 1, 1946**

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	4	4	206
3300	47	B	0	0	0	156
3166	37	D	0	0	0	132
3167	37	B	0	1	1	128
3170	38	L	0	0	0	61
3170	38	D	0	0	0	133
3154	34	B	0	4	4	96
3154	34	L	0	10	10	107
3154	34	D	0	12	12	138
3157	33	B	0	1	1	152
3157	33	L	0	3	3	85
3157	33	D	0	0	0	85
3163	40	L	0	0	0	35
3163	40	D	0	0	0	52
3153	29	B	1	13	14	126
3153	29	L	0	3	3	131
3156	35	L	0	1	1	19
3156	35	D	0	6	6	57
3155	36	B	4	0	4	80
3155	36	L	2	4	6	32
3155	36	D	2	2	4	20
3159	17	D	0	2	2	46
3168	18	L	0	0	0	14
3168	31	D	0	1	1	68
3158	30	B	5	7	12	36
3158	30	L	0	0	0	11
3140	39	B	0	1	1	43
Totals.....			14	75	89	2,249

[fol. 368]

Colored and White Passengers Served Between Washington and Atlanta  
October 2, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	10	10	225
3302	47	B	0	8	8	147
3170	37	D	0	0	0	117
3166	37	B	0	0	0	69
3167	38	L	0	0	0	51
3167	38	D	0	0	0	132
3160	34	B	2	1	3	76
3160	34	L	2	0	2	71
3160	34	D	0	1	1	119
3154	33	B	0	11	11	104
3154	33	L	0	4	4	76
3154	33	D	0	2	2	46
3162	40	L	0	8	8	32
3162	40	D	0	6	6	81
3163	29	B	5	8	13	130
3163	29	L	1	1	2	60
3164	35	L	4	6	10	27
3164	35	D	2	6	8	87
3156	36	B	4	2	6	60
3156	36	L	4	0	4	39
3156	36	D	5	1	6	20
3158	17	D	2	7	9	29
3159	18	L	0	1	1	15
3159	31	D	0	0	0	68
3168	30	B	4	5	9	58
3168	30	L	0	0	0	11
3142	39	B	0	0	0	40
Totals.....			35	88	123	1,990

[fol. 369]

Colored and White Passengers Served Between Washington and Atlanta  
October 3, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3300	48	B	0	9	9	187
3301	47	B	0	6	6	152
3167	37	D	0	0	0	140
3170	37	B	0	0	0	67
3166	38	L	0	1	1	62
3166	38	D	0	2	2	149
3157	34	B	2	1	3	72
3157	34	L	2	2	4	81
3157	34	D	2	2	4	110
3160	33	B	1	17	18	98
3160	33	L	1	13	14	63
3160	33	D	0	5	5	24
3153	40	L	2	2	4	23
3153	40	D	0	2	2	57
3162	29	B	0	8	8	98
3162	29	L	0	8	8	67
3155	35	L	0	1	1	21
3155	35	D	0	3	3	64
3164	36	B	3	1	4	46
3164	36	L	0	4	4	31
3164	36	D	1	0	1	24
3168	17	D	9	3	12	46
3158	18	L	0	0	0	17
3158	31	D	1	2	3	78
3159	30	B	2	5	7	56
3159	30	L	0	3	3	36
3140	39	B	0	3	3	29
Totals.....			26	103	129	1,898

[fol. 370]

**Colored and White Passengers Served Between Washington and Atlanta  
October 4, 1946**

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	7	7	208
3300	47	B	0	5	5	159
3166	37	D	0	0	0	130
3167	37	B	0	0	0	73
3170	38	D	0	0	0	89
3154	34	B	0	4	4	64
3154	34	L	0	5	5	67
3154	34	D	0	8	8	145
3157	33	B	0	2	2	137
3157	33	L	0	3	3	95
3157	33	D	0	0	0	79
3163	40	L	0	0	0	23
3163	40	D	2	0	2	47
3153	29	B	1	5	6	107
3153	29	L	1	0	1	53
3156	35	L	1	0	1	21
3156	35	D	0	8	8	54
3155	36	B	2	2	4	80
3155	36	L	4	0	4	56
3155	36	D	1	4	5	43
3159	17	D	0	0	0	96
3168	18	L	0	0	0	42
3168	31	D	0	1	1	104
3158	30	B	0	0	0	33
3158	30	L	0	0	0	16
3142	39	B	0	4	4	39
Totals.....			12	58	70	2,060

3170

38

L

No Service



[fol. 371]

**Colored and White Passengers Served Between Washington and Atlanta  
October 5, 1946**

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	0	0	215
3302	47	B	0	3	3	211
3170	37	D	0	0	0	118
3166	37	B	0	0	0	67
3167	38	L	0	0	0	96
3167	38	D	0	0	0	137
3160	34	B	1	1	2	101
3160	84	L	1	0	1	122
3160	34	D	0	1	1	155
3154	33	B	0	12	12	185
3154	33	L	0	9	9	109
3154	33	D	0	0	0	52
3162	40	L	1	11	12	188
3162	40	D	1	9	10	162
3163	29	B	3	4	7	134
3163	29	L	0	1	1	46
3164	35	L	0	1	1	26
3164	35	D	3	2	5	61
3156	36	B	2	3	5	32
3156	36	L	0	2	2	30
3156	36	D	0	0	0	23
3158	17	D	0	0	0	59
3159	18	L	0	0	0	32
3159	31	D	0	1	1	86
3168	30	B	2	4	6	49
3168	30	L	0	0	0	21
3140	39	B	0	3	3	44
Totals.....			14	67	81	2,561

[fol. 372]

Colored and White Passengers Served Between Washington and Atlanta  
October 6, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	0	0	206
3300	47	B	0	8	8	196
3167	37	D	0	0	0	149
3170	37	B	0	11	11	80
3166	38	L	0	0	0	71
3166	38	D	0	0	0	155
3157	34	B	5	2	7	68
3157	34	L	5	2	7	66
3157	34	D	0	1	1	161
3160	33	B	0	2	2	150
3160	33	L	1	0	1	102
3160	33	D	0	3	3	65
3163	40	L	1	0	1	8
3163	40	D	0	3	3	55
3162	29	B	0	8	8	95
3162	29	L	0	3	3	53
3155	35	L	1	4	5	25
3155	35	D	1	4	5	81
3164	36	B	2	2	4	105
3164	36	L	0	2	2	90
3164	36	D	1	1	2	61
3168	17	D	0	1	1	67
3158	18	L	0	0	0	18
3158	31	D	0	2	2	82
3159	30	B	0	7	7	53
3159	30	L	0	1	1	21
3142	39	B	0	0	0	39
Totals.....			17	67	84	2,322

[fol. 373]

**Colored and White Passengers Served Between Washington and Atlanta  
October 7, 1946**

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	9	9	211
3300	47	B	0	7	7	155
3166	37	D	0	0	0	137
3167	37	B	0	0	0	93
3170	38	L	0	0	0	46
3170	38	D	0	1	1	122
3154	34	B	0	1	1	42
3154	34	L	0	1	1	44
3154	34	D	0	10	10	106
3157	33	B	0	2	2	93
3157	33	L	0	2	2	43
3157	33	D	0	0	0	26
3153	40	L	0	0	0	48
3153	40	D	0	2	2	101
3163	29	B	1	5	6	99
3163	29	L	1	1	2	24
3156	35	L	0	1	1	20
3156	35	D	0	2	2	43
3155	36	B	0	1	1	84
3155	36	L	0	5	5	53
3155	36	D	0	3	3	43
3159	17	D	0	4	4	48
3168	18	L	0	0	0	7
3168	31	D	0	0	0	50
3158	30	B	0	0	0	19
3158	30	L	No Service			
3140	39	B	0	0	0	40
<b>Totals.....</b>			<b>21</b>	<b>57</b>	<b>59</b>	<b>1,797</b>

[fol. 374]

**Colored and White Passengers Served Between Washington and Atlanta  
October 8, 1946**

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	4	4	157
3302	47	B	0	11	11	149
3170	37	D	0	0	0	115
3166	37	B	0	0	0	72
3167	38	L	0	0	0	66
3167	38	D	0	0	0	169
3160	34	B	2	3	5	51
3160	34	L	1	2	3	62
3160	34	D	3	6	9	87
3154	33	B	0	12	12	99
3154	33	L	0	5	5	66
3154	33	D	0	0	0	33
3162	40	L	0	5	5	13
3162	40	D	0	3	3	56
3153	29	B	0	2	2	101
3153	29	L	0	0	0	50
3164	35	L	0	0	0	24
3164	35	D	0	0	0	54
3156	36	B	1	0	1	51
3156	36	L	1	0	1	42
3156	36	D	0	2	2	40
3158	17	D	1	2	3	56
3159	18	L	0	5	5	3
3159	31	D	3	10	13	76
3168	30	B	1	7	8	18
3168	30	L	1	4	5	2
3142	39	B	0	0	0	30
Totals.....			14	83	97	1,742



[fol. 375]

Colored and White Passengers Served Between Washington and Atlanta  
October 9, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3300	48	B	0	11	11	157
3301	47	B	0	5	5	158
3167	37	D	0	0	0	119
3170	37	B	0	0	0	61
3166	38	L	0	3	3	80
3166	38	D	0	3	3	100
3157	34	B	0	0	0	69
3157	34	L	0	4	4	53
3157	34	D	0	4	4	105
3160	33	B	3	4	7	79
3160	33	L	0	1	1	56
3160	33	D	0	0	0	17
3163	40	L	0	3	3	14
3163	40	D	0	3	3	46
3162	29	B	0	10	10	89
3162	29	L	0	4	4	28
3155	35	L	0	3	3	18
3155	35	D	0	6	6	38
3164	36	B	2	2	4	61
3164	36	L	0	0	0	23
3164	36	D	0	0	0	18
3168	17	D	1	1	2	45
3158	18	L	1	1	2	28
3158	31	D	0	0	0	75
3159	30	B	1	0	1	36
3159	30	L	1	3	4	18
3140	39	B	0	1	1	42
Totals: .....			9	72	81	1,633

[fol. 376]

Colored and White Passengers Served Between Washington and Atlanta  
October 10, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	1	4	5	145
3300	47	B	0	4	4	114
3166	37	D	0	6	6	186
3167	37	B	0	0	0	49
3170	38	L	0	0	0	60
3170	38	D	0	1	1	61
3154	34	B	0	3	3	53
3154	34	L	0	4	4	43
3154	34	D	0	2	2	97
3157	33	B	0	0	0	100
3157	33	L	0	0	0	90
3157	33	D	0	0	0	60
3153	40	L	0	1	1	14
3153	40	D	0	1	1	36
3163	29	B	0	6	6	105
3163	29	L	0	0	0	33
3156	35	L	0	0	0	38
3156	35	D	0	10	10	68
3155	36	B	2	4	6	42
3155	36	L	2	1	3	36
3155	36	D	0	0	0	31
3159	17	D	0	0	0	52
3168	18	L	0	0	0	20
3168	31	D	1	1	2	63
3158	30	B	0	4	4	31
3158	30	L	No Service			
3142	39	B	0	1	1	38
Totals.....			6	53	59	1,665

[fol. 377] IN DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF MARYLAND

Civil No. 3829

Argued June 4th, 1948.

Decided September 25, 1948.

ELMER W. HENDERSON, Plaintiff,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES  
OF AMERICA, Defendants

Lawson, McKenzie & Windsor (B. V. Lawson, Jr., of  
Washington, D. C.; Josiah F. Henry, Jr., of Baltimore),  
for plaintiff.

Daniel W. Knowlton and Allen Crenshaw for Interstate  
Commerce Commission.

Bernard J. Flynn, United States Attorney, and Charles  
Clark and A. J. Dixon, of Washington, D. C., for Southern  
Railway Co.

Before Soper, Circuit Judge, and Coleman and Chesnut,  
District Judges.

Order of Interstate Commerce Commission—Dining Car  
Service Afforded Negro Passengers on The Southern  
Railway—Alleged Discrimination—Complaint Dismissed.

OPINION—Filed September 25, 1948

COLEMAN, District Judge.

This suit is brought by the plaintiff, under the provisions  
of 28 U. S. C. A. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A.  
Sec. 17 (9), to set aside an order of the Interstate Com-  
merce Commission entered on September 5th, 1947. The  
contested order involves dining car service afforded Negro  
passengers on the Southern Railway. This is the second  
time that the present plaintiff has litigated the question  
before the Commission and this Court. The Southern Rail-  
way asked for, and was granted leave to intervene as a  
party defendant, it having been the sole defendant in the  
proceeding before the Commission which resulted in the  
issuance of the order which plaintiff now seeks to annul.

The facts involved in the prior proceeding, before both  
the Commission and this Court, which led up to the present  
suit may be summarized as follows: On October 10th, 1942,



the plaintiff, a Negro, filed a complaint with the Interstate Commerce Commission alleging that on May 17th, 1942, while traveling as a first class passenger on the Southern Railway from Washington, D. C. to Atlanta, Georgia, that [fol. 378] Railway subjected him to undue and unreasonable prejudice and disadvantage, in derogation of his rights under the Federal Constitution and the Interstate Commerce Act, (1) by providing insufficient tables and service for Negroes in its dining car; (2) by the use of a curtain around the tables allegedly reserved for Negroes; and (3) by giving preference and advantage to white persons, in that it failed and refused to serve plaintiff at tables in its dining car where there were empty seats, these tables and seats, although allegedly reserved for Negroes, being allowed to be used by white persons. The Commission was asked to require defendant to desist from such discrimination and in the future, to establish for the transportation of Negro interstate passengers over its lines equal and just dining car facilities, and such other services and facilities as the Commission might consider reasonable and just. Plaintiff also asked for damages by reason of the alleged discrimination.

After due hearing, on May 13th, 1944, Division No. 2 of the Commission rendered its report (258 I. C. C. 413) in which it found that while plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, it, nevertheless, found that there was no basis for an award of damages by way of reparation, or necessity for an order for the future. The Commission said (258 I. C. C. 419): "As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee (The dining car Steward) of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining car service.

"\* \* \* As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose." Accordingly, the Commission dismissed the complaint.



On appeal to this Court to set aside the action of the Commission, we held (*Henderson vs. United States*, 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railway's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service. We so found for the reasons as stated in our detailed opinion, as follows (63 F. Supp. 906 at 915-916): "In the case of the white passenger, he is merely required (by the Railway's dining car regulations) to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eyes of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of a car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

"We accept the Commission's construction of the supplemental regulation and its finding that the general practice [fol. 380] thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But, nevertheless, in our opinion the regulation so construed, applied and practised, does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers; nor do we think it unreasonable, in view of the recently

prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or, if none there, elsewhere in the dining car.

"The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at pages 96, 97, 61 S. Ct. 873, at page 877, 85 L. Ed. 1201): 'It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers [fol. 381] can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.'

• • • • •

'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'

"The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner,

and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served on coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches."

With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine. However, for the other reason just stated, by decree entered on February 15th, 1946, this Court set aside the order of the Commission dismissing the complaint, and remanded the case to the Commission for further proceedings "in the light of the principles outlined" in our opinion. As a result, the Southern Railway thereupon issued, effective March 1st, 1946, the following new [fol. 382] instructions for the regulation of its dining car service, canceling the instructions previously in effect:

"Subject: Segregation of White and Colored Passengers In Dining Cars.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.



(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules."

The Commission reopened the proceeding for further hearing; the Southern Railway presented additional evidence, and on September 5th, 1947, the Commission filed a report (two Commissioners dissenting in part) in which it affirmed its prior findings to the effect that whereas complainant had been subjected to undue and unreasonable prejudice and disadvantage on one particular occasion, no basis for an award of damages had been shown, and further found that the new dining car regulations established by [fol. 383] defendant, effective March 1st, 1946, and currently in force, which we have above quoted, were not in violation of Section 3 or any other provision of the Interstate Commerce Act. Accordingly, the Commission refused to enter an order for the future, and dismissed the complaint, whereupon the present suit was brought seeking to annul this latest action on the part of the Commission.

It will thus be seen that the precise question presented for decision is whether the Interstate Commerce Commission, by this second report and order, has fully complied with the direction given to it by this Court when we reversed the earlier action of the Commission, dismissing the complaint and remanded the proceeding to the Commission "for further proceedings in the light of the principles" set forth in our opinion.

The sum and substance of the Commission's position is that the same facts and issues are involved in this proceeding as in the previous one, with the exception of the Southern Railway's amended dining car regulations; that these amended regulations promulgated by the Railway as a result of our prior ruling, have removed the discrimination found by this Court to have been latent in the Railway's previous regulations, namely, that the Railway now provides adequately and reasonably for the equality of service and treatment of Negroes and whites as required by our decision. We quote the following from the Commission's report (269 I.C.C. 73 at —): "The current regulations were designed by the defendant to meet the Court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has



abolished its former practice, condemned by the court, of permitting white patrons to be seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no [fol. 384] circumstances are white passengers served in such space; nor are colored passengers served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

"Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days, May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 per cent., were served to Negro civilians and 706, or 1.88 per cent., to Negroes in the military service. Of 20,789 meals served during the first 10 days of October, 1946, 723 or 3.48 per cent. of the total, were served to Negro civilians and 149, or 0.72 per cent., to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 per cent. of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 per cent of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

"As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 per cent. during the May, 1945 test period to 3.48 per cent. during the October, 1946, period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us,

**MICRO**

TRADE

**CARD**

MARK



**1691**



**49**



however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division [fol. 385] between the races of its available dining-car space."

With respect to the curtains separating the tables reserved for Negroes from the other tables, the Commission in its report said (269 I. C. C. 73 at ) : "At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wood partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendant's intention to make similar structural changes in all of them.

The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's decision the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability [fol. 386] that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service

has been begun, and may desire at that time or later to be served in the dining car.

Next, as concerns the matter of curtains separating Negro dining car patrons from the white patrons, in our prior opinion we stated (63 F. Supp. 906 at 916) that "Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine." As above explained, the Railway Company is now in the process of abandoning the use of curtains as a means of separating the tables and, in their stead, is constructing in its dining cars permanent, wooden partitions, approximately five feet high, extending from the side of the car to the aisle. Also, it is removing from all of its dining cars the table which had formerly occupied the space directly opposite the table now exclusively reserved for colored passengers, and this space is being utilized as an office for the dining car steward. As also explained in its report, the Commission, in *Mays vs. Southern Railway Company*, 268 I. C. C. 352, decided April 8, 1947, had before it this same question, under precisely the same dining car regulations as those now before us, and found that there was no basis for holding this manner of separation of the different tables to be a forbidden discrimination.

We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission [fol. 387] has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint



must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

We turn then to a consideration of whether any pertinent decisions have been rendered by the Supreme Court subsequent to our earlier decision: We find only two cases, namely, *Morgan vs. Virginia*, 328 U. S. 373, and *Bob-Lo Excursion Co. vs. Michigan*, 333 U. S. 28, sufficiently related to invite attention. At the time of our previous opinion the *Morgan* case had been decided by the Supreme Court of Appeals of Virginia, 184 Va. 24, but the appeal therein to the Supreme Court was still undecided. As pointed out in our previous opinion, that case involved the validity of a Virginia statute and State court action to enforce the same, and did not involve, as does the case here, the validity of the regulations of a common carrier. The Supreme Court reversed the State Court and held unconstitutional, as a burden on interstate commerce, the Virginia statute which required separation of the races in motor buses. This requirement was described by the Supreme Court in its opinion as follows (328 U. S. 373 at 36'): "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort or convenience of passengers.' This [fol. 388] occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

In our consideration of the *Morgan* case in our earlier opinion, as that case then stood, we stated (63 F. Supp. 906 at 913-914) that "it is not necessary to approach the present case from this aspect (the fact that Virginia's segregation laws were applicable alike to interstate as well as intrastate rail transportation) because as we have said,

*the real question before us is not one of segregation, but of equality of treatment.* Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the Railway Company does not rely on them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case, because it does not, at least in terms purport to embrace dining car service. \* \* \* Then, after quoting the Virginia statute, we said: "Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case because nothing short of race segregation in separate cars, or in compartments 'divided by a good and substantial partition, with a door therein,' would satisfy those provisions."

That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute [fol. 389] and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said; 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' *Chiles vs. Chesapeake & Ohio R. R. Co.*, 218 U. S. 71, 75." See also *Simmons vs. Atlantic Greyhound Corporation*, 75 F. Supp. 166; *Stamps vs. Louisville & Nashville Railroad Co.*, I. C. C.

The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at ): "Defendant's dining car regulations apply only to service in dining cars which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

We turn then to the only other case decided by the Supreme Court since our earlier opinion in this proceeding



was rendered, which likewise appears pertinent but actually is not, to the present issue, namely, *Bob-Lo Excursion Company vs. Michigan*, supra. There, it was decided that a Michigan statute prohibiting Negro segregation in all public service including transportation, was legally enforceable with respect to refusal of a Michigan corporation, engaged chiefly in the round-trip of passengers from Detroit to Bois Blanc Island, Canada, to sell a ticket to a Negro for transportation to the latter resort which was reserved for white people, because, although the Michigan corporation was engaged in foreign commerce, application of the Michigan law to appellant was held not to contravene the commerce clause of the Federal Constitution.

In its opinion in the *Bob-Lo Excursion Company Case*, the [fol. 390] Supreme Court distinguished *Morgan vs. Virginia*, supra, and *Hall vs. Decuir*, 95 U. S. 485, saying (333 U. S. 28 at 39-40): "The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here."

The even more recent decisions of the Supreme Court involving deed covenants prohibiting sales of realty to Negroes, *Shelley vs. Kraemer*, U. S. ; *Hurd vs. Hodge*, U. S. ; *McGhee vs. Sipes*, U. S. ; and *Uricolo vs. Hodge*, U. S., obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier.

Reliance is also placed by counsel for plaintiff upon *Matthews vs. Southern Railway Company*, 157 F. (2d) 609. There, the only issue was the correctness of the trial judge's charge to the jury in a race separation case. The Court of Appeals for the District of Columbia, in a footnote reference to the Morgan case, said (page 610) it could see "no valid distinction between segregation in buses and in railroad cars." We believe that we have already addressed

ourselves sufficiently to this point to indicate that, in our opinion, there is a very definite distinction from the aspect of dining car accommodations during railroad transportation.

To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or [fol. 391] any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at ): "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

For the reasons herein set forth the complaint must be dismissed.

I concur.

W. Calvin Chesnut, U. S. District Judge.



[fol. 392]

## DISSENTING OPINION

SOPER, Circuit Judge (dissenting):

Insofar as the opinion of the court sustains the Railroad Company's dining car regulations on the ground that they made adequate provision for the number of Negro passengers likely to apply for service, I am constrained to dissent. The Railroad Company has found that less than 4 per cent of its dining car patrons are Negroes, and it reserves 8 per cent of the available space for their exclusive use. This arrangement on its face seems fair to the Negro race, but it is based on the erroneous assumption that the rights which the Fourteenth Amendment is designed to protect are racial rather than personal in their nature. The regulations set aside one table in the dining car exclusively for Negroes and ten tables exclusively for whites, and the result is that occasionally a member of one race is denied service which is then available to a member of the other. Whenever this occurs, the Railroad Company discriminates against one passenger in favor of another because of his race, and deprives him of equality of treatment, and it is no answer to say that the Railroad Company has taken reasonable precautions to prevent the occurrence. It is true that segregation of the races is lawful provided "substantial equality of treatment of persons traveling under like conditions" is accorded; but the right belongs to the individual and not to the race, and segregation must be abandoned, or at least temporarily suspended, whenever its enforcement deprives the individual of treatment equal to that accorded to any other person at the same time.

Segregation in railroad traffic may be maintained if there are sufficient accommodations for all; but a vacant seat may not be denied to a passenger simply because of his race. The decisions of the Supreme Court support this view. In *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151 (1914), the court upheld an Oklahoma statute which required the Railroad Company to provide separate but equal accommodations for the two races in intrastate railroad travel, but struck down a section of the Act which permitted the carrier to provide sleeping cars, dining car, or chair cars to be used [fol. 393] exclusively by either white or Negro passengers, separately but not jointly. It is not questioned that the meaning of this provision was that the carrier might provide these cars for white persons but need not provide similar

accommodations for Negroes, because there were not enough Negroes seeking these accommodations to warrant the expense of providing them. Justice Hughes, in holding this section unconstitutional, said: (pp. 161-2):

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon their being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

It may be suggested that the McCabe case is distinguishable because in that case the Railroad Company made no provision for colored passengers desiring first class service, whereas the regulations under examination in the present case are designed to care for all colored passengers that may be reasonably expected to apply. The distinction, however, is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizen. Moreover, in 1940, the Supreme Court in *Mitchell v. United States*, 313 U. S. 80, reiterated the ruling that constitutional rights are personal and not racial, in a case where the carrier contemplated the probability that Pullman service would be demanded by Negroes, but made insufficient provision to meet the demand. Whenever that occurred, the court said, the [fol. 394] Railroad Company was required to abandon the policy of segregation and seat the colored passenger in the car ordinarily reserved for whites. It had been the practice of the Railroad Company to accommodate the occasional Negro applicant for a chair in a Pullman car by giving him a seat in a drawing room at the same rate as was charged for a seat in the body of the car, but to compel the passenger

to take a place in an ordinary coach when no drawing room was available. Adopting the view of the Government which opposed the regulation, Chief Justice Hughes, speaking for the court, said: (pp. 96-7)

"The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.' And the Commission has recognized that inequality persists with respect to certain other facilities such as dining car and observation-parlor car accommodations.

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe v. Atchison T. & S. F. Ry. Co.*, supra. While the supply of particular [fol. 395] facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. *Id.* See, also, *Missouri, ex rel. Gaines v. Canada*, pp. 350, 351 (305 U. S. 337). And the Interstate Commerce Act expressly extends its prohibi-

tion to the subjecting of 'any particular person' to unreasonable discriminations."

The same principle was again approved by the Supreme Court in the recent case of *Shelley vs. Kraemer*, 68 S. Ct. 836, which dealt with the validity of restrictive covenants in deeds designed to exclude Negroes from the ownership or occupancy of real property. The court held that covenants of this nature are unenforceable and, pointing out that the constitutional rule of equality is personal, declared that the denial of such a right to a Negro is not validated by the denial of the right under like circumstances to a white person. Chief Justice Vinson said: (p. 846)

"Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or Federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts [fol. 396] may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities".

The carrier in the pending case has undoubtedly made an earnest effort to meet the criticisms directed at its earlier regulation in the former opinion of this court, and consequently instances of discrimination on account of race are less likely to occur under the regulation now prevailing. Nevertheless that regulation must also be condemned because it occasionally permits discrimination against members of both races in the allotment of dining-room privileges; and the court should therefore hold that the practice of the carrier in segregating the races in its dining-cars



must be suspended whenever its enforcement results in the denial to any individual of his constitutional right of equality of treatment.

[fol. 397] IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

ELMER W. HENDERSON, Plaintiff,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COM-  
MISSION, Defendants.

SOUTHERN RAILWAY COMPANY, Intervenor.

Civil Action No. 3829

DECREE—Filed October 28, 1948

This cause coming on to be heard the 4th day of June, 1948 before the regularly constituted Statutory Court, defendants and intervenor being represented by counsel, and the action being submitted to the Court upon the pleadings, certified records of the proceedings before the Interstate Commerce Commission, and the briefs and arguments of counsel, and the Court having entered its Opinion sustaining the order of the Interstate Commerce Commission entered September 5, 1947 wherein the complaint of plaintiff was dismissed,

It is ordered, adjudged and decreed that the complaint herein be, and the same is hereby dismissed at the cost of plaintiff.

October 28, 1948.

Morris A. Soper, United States Circuit Judge,  
William C. Coleman, United States District Judge,  
W. Calvin Chesnut, United States District Judge.

Seen: Belford V. Lawson, Jr., Attorney for Plaintiff,  
W. D. MacFarlane, Attorney for United States, Defendant;  
Allen Crenshaw, Attorney for Interstate Commerce Com-  
mission, Defendant; A. J. Dixon, Attorney for Southern  
Railway, Intervenor.

[fol. 398] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

PETITION FOR APPEAL—Filed November 17, 1948

Elmer W. Henderson, plaintiff in the above entitled cause, feeling himself aggrieved by the final decree of the United States District Court for the District of Maryland, entered in said Court on October 28, 1948, prays an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said plaintiff considers the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated November 17, 1948.

Lawson, McKenzie & Windsor, 2001 11th St., N. W.  
Washington, D. C.; by B. V. Lawson, Jr., Josiah  
F. Henry, 22 St. Paul Street, Baltimore, Md.,  
Attorneys for Plaintiff.

[fol. 399] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Civil Action No. 3829

ASSIGNMENT OF ERRORS—Filed November 17, 1948

Comes now the plaintiff and files the following assignment of errors upon which he shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the decree of the United States District Court for the District of Maryland, entered on the 28th day of October, 1948.

The District Court erred:

1. In concluding that the precise question presented for decision is whether the Interstate Commerce Commission

complied with its direction when the Commission's earlier action was reversed and the case remanded for further proceedings.

2. In giving effect to the Commission's findings as to the volume of traffic, by race of passengers.

3. In giving effect to the Commission's conclusions that the railroad's present regulation provides an equitable and reasonable division between the races of its available dining car space.

4. In holding that the Virginia statute does not embrace dining car service and that the railroad and the Commission did not rely on said statute.

5. In concluding that the undesirability of the location of the table allotted to Negro passengers is non-existent.

6. In giving effect to the Commission's finding that the present dining car regulation is not in violation of section 3 or any other provision of the Interstate Commerce Act.

[fol. 400] 7. In concluding that the inequality existing in the railroad's previous regulation with respect to facilities afforded white and Negro passengers has been removed by the railroad's amended regulation.

8. In concluding that refusal of service to a Negro at any available seat in the diner when the reserved table is occupied is not more unjust or inequitable than the situation where both white and colored passengers must wait because every seat is occupied.

9. In holding that the real question before the Court is equality of treatment, not segregation.

10. In concluding that the complaint necessarily must be dismissed unless the principles regarding equality of treatment of races in interstate transportation have been extended by the Supreme Court since the Court's previous decision.

11. In holding that the cases of *Morgan v. Virginia*, 328 U. S. 373 and *Bob-Lö Excursion Co. v. Michigan*, 333 U. S. 28 are not pertinent to the present issue and that the covenant cases (*Shelley v. Kraemer*, — U. S. —; *Hurd v. Hodge*, — U. S. —; *McGhee v. Sipes*, — U. S. —, and *Urciolo v. Hodge*, — U. S. —) have no relation directly or indirectly

to the principles governing the conduct of interstate transportation by common carrier.

12. In holding that there is a very definite distinction between racial segregation in interstate dining car accommodations and in interstate motor travel by common carrier.

13. In holding that the railroad may refuse service to any passenger at a vacant seat allotted to passengers of another race.

14. In concluding that racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races.

[fol. 401] 15. In concluding that the allotment of seats in interstate dining cars does not per se spell inequality as long as such allotment, accompanied by equality of meal service, is made and kept proportionately fair.

16. In dismissing the complaint.

17. In failing to find that the Commission's order is not supported by the evidence and is without rational basis.

18. In failing to hold that the Commission's approval of the regulation, based solely on the race of passengers, is beyond its power.

19. In failing to find that the present regulation violates section 1(4) of the Interstate Commerce Act.

20. In failing to find that the present regulation violates section 3(1) of the Interstate Commerce Act.

21. In upholding the regulation segregating interstate passengers, solely on account of their race.

22. In failing to hold that denial of service to any passenger at a vacant seat is discriminatory and is a denial of the passenger's constitutional right of equality of treatment.

23. In failing to hold that the regulation is discriminatory because it is designed to meet the demands of races and not of the particular, individual passenger.

24. In failing to hold that the Commission's approval of the regulation enforcing segregation, solely on account of



race, is a deprivation of plaintiff's liberty without due process of law.

25. In permitting a common carrier to segregate interstate passengers according to race, a practice forbidden to the States.

26. In failing to hold that the regulation is contrary to the national transportation policy.

27. In failing to hold that the regulation is a burden on interstate commerce.

28. In failing to hold that the regulation is contrary to the public policy against race discriminations and race distinctions.

[fol. 402] Lawson, McKenzie & Windsor, 2001 11th St., N. W., Washington, D. C., by B. V. Lawson, Jr., Josiah F. Henry, 22 St. Paul Street, Baltimore, Md., Attorneys for Plaintiff.

[fol. 403] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 17, 1948

In the above entitled cause, Elmer W. Henderson, plaintiff therein, having made and filed his petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered October 28, 1948, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided;

It Is Ordered and Decreed that the appeal be, and the same is hereby allowed as prayed for;

And It Is Further Ordered that the amount of the appeal bond be set at \$250.00.

W. Calvin Chesnut, United States District Court.

Dated November 17, 1948.

[fol. 404] Citation in usual form, filed November 17, 1948, omitted in printing.

[fol. 405] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

## ORDER EXTENDING TIME

Upon motion of Elmer W. Henderson, plaintiff-appellant, and good cause having been shown,

It is ordered, That the time for docketing the case and the filing of the record thereof, in the Supreme Court of the United States, be and the same is hereby enlarged for further period of 30 days from the return day of the citation on appeal.

Dated December 13, 1948.

W. Calvin Chesnut, United States District Judge.

## Certificate of Service

I hereby certify that I served the Motion for Order Enlarging Time for Docketing the Case and Filing the Record Thereof with the Clerk of the Supreme Court and Order by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Attorney for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, attorney for Southern Railway Company, P. O. Box 1806, Washington, D. C.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson.

[fol. 406] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

## ORDER EXTENDING TIME

Upon motion of Elmer W. Henderson, plaintiff-appellant, and good cause having been shown,

It is ordered, That the time within which this case shall be docketed and the record thereof filed in the Supreme

Court of the United States be, and the same hereby is, extended to and including February 20, 1949.

Dated January 22, 1949.

W. Calvin Chesnut, United States District Judge.

Certificate of Service

I hereby certify that I served the above Order by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

Dated January 22, 1949.

B. V. Lawson, Jr.

[fol. 407] IN UNITED STATES DISTRICT COURT

Civil Action No: 3829

[Title omitted]

ORDER AS TO ORIGINAL PAPERS AND DOCUMENTS—Filed  
January 22, 1949

Upon motion of Elmer W. Henderson, plaintiff-appellant and good cause having been shown,

It is ordered, That the following original papers and documents, in lieu of copies thereof, all of which were received in evidence in this Court in the trial of this cause, be forwarded as a part of the transcript of the record of this case on appeal to the Supreme Court of the United States:

1. Transcript from Interstate Commerce Commission, under Certificate of Secretary, Interstate Commerce Commission, dated August 27, 1945, and filed September 18, 1945, which is designated in paragraph 2(c) of the Stipulation as to Record filed herein on January 22, 1949;

2. Stenographer's minutes of hearing before Interstate Commerce Commission on October 15, 1946 in Henderson v. Southern Railway Company, I.C.C. Docket No. 28895, which is designated in paragraph 3 of the Stipulation as to Record filed herein on January 22, 1949.

Dated January 22, 1949.

W. Calvin Chesnut, United States District Judge.

## [fol. 408] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 17,  
1949

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint and exhibits attached thereto.
2. Answer of United States.
3. Answer of Interstate Commerce Commission.
4. Intervention of Southern Railway and Answer.
5. Transcript of record of hearing on June 4, 1948, together with exhibits introduced in evidence including record before Interstate Commerce Commission in *Henderson v. Southern Railway Co.*, Docket No. 28895.
6. Opinion filed September 25, 1948.
7. Final decree entered October 28, 1948.
8. Petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Citation on appeal.
12. Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.
13. This praecipe.

Dated December 11, 1948.

Lawson, McKenzie & Windsor, 2001 11th St., N. W.,  
Wash., D. C., by B. V. Lawson, Jr.

Josiah F. Henry, 22 St. Paul St., Baltimore, Md., Attorneys for Plaintiff (Appellant).

[fol. 409]

## Certificate of Service

I hereby certify that I served the above praecipe for transcript of record by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen Cren-



shaw, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, Southern Railway Company, P. O. Box 1808, Washington, D. C.

Dated December 11, 1948.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson, Plaintiff (Appellant).

[fol. 410] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

STIPULATION AS TO RECORD—Filed January 22, 1949

It is stipulated by and between counsel for the parties hereto that the following papers and documents are included in Item 5 of Plaintiff-Appellant's Praecipe for Transcript of Record and are designated as a part of the record of this case on appeal to the Supreme Court of the United States:

1. Transcript of hearing in this Court on June 4, 1948.
2. The record in the prior case (Henderson v. United States, Civil Action No. 2455, United States District Court for the District of Maryland) shall consist of:
  - a. Complaint and plaintiff's exhibit A.
  - b. Answer of Interstate Commerce Commission.
  - c. Amendment to Answer of Interstate Commerce Commission and I. C. C. Orders in Henderson v. Southern Railway Co., I. C. C. Docket No. 28895, dated May 13, 1944 and September 18, 1944.
  - d. Answer of Southern Railway Company.
  - e. Transcript from Interstate Commerce Commission, under certificate of Secretary, I. C. C. of August 27, 1945, filed September 18, 1945.
  - f. Opinion of the Court.
  - g. Decree dated February 13, 1946.

3. Stenographer's minutes of hearing before the I. C. C. on October 15, 1946, in Henderson v. Southern Railway Co.,

I. C. C. Docket No. 28895, pp. 195 to 239, prepared by Alderson Reporting Co., 306 9th St., N. W., Washington, D. C., official reporters, and Exhibits 3 to 9 of the Southern Railway Company, said minutes and exhibits not under the [fol. 411] certificate of the Secretary, Interstate Commerce Commission.

-Dated January 18, 1949.

Lawson, McKenzie & Windsor, 2001 11th St., N. W., by B. V. Lawson, Jr.; Josiah F. Henry, 22 St. Paul St., Balt., Md., Attorneys for Elmer W. Henderson, Plaintiff-appellant. Allen Crenshaw, Attorney for Interstate Commerce Commission. Edward Dumbauld, Special Assistant to the Attorney General. Charles Clark, A. J. Dixon, Attorney for Southern Railway Company.

[fol. 412] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed  
January 22, 1949

To the Clerk of the above-named Court:

You are hereby requested in preparing the transcript of the record in the above entitled case to be filed in the Supreme Court of the United States, pursuant to the appeal allowed therein, to include in such transcript the following portions of the record in addition to those indicated in the plaintiff-appellant's praecipe for transcript of record filed herein:

1. Order entered December 13, 1948 enlarging time for docketing the case and filing the record thereof with the Clerk of the Supreme Court.

2. Stipulation as to Record filed January 22, 1949.

3. Order of January 22, 1949 extending time to February 20, 1949 for docketing the case and filing record thereof in the Supreme Court of the United States.

4. Order of January 22, 1949 as to Original Papers and Documents.

5. This supplemental praecipe.

Dated January 22, 1949.

Lawson, McKenzie Windsor, 2001 11th St. N. W.,  
Washington, D. C., by B. V. Lawson, Jr.

Josiah F. Henry, 22 St. Paul St., Balt., Md., Attorneys  
for Plaintiff-Appellant.

### Certificate of Service

I hereby certify that I served the above supplemental praecipe for transcript of record by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Attorney for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C. Edward H. Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. [fol. 413] Charles Clark, Attorney for Southern Railway Company, P. O. Box 1808, Washington, D. C.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson,  
Plaintiff-Appellant.

[fol. 414] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 415] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF  
PARTS OF RECORD TO BE PRINTED—Filed March 2, 1949

Appellant Elmer W. Henderson, pursuant to Rule 13, paragraph 9, states that he will rely upon the points made in his assignment of errors and, for the purpose of enabling this Court to consider said points, designates the following parts of the record to be printed:

1. Complaint and Exhibits A and B (Appellant's Praecipe for Transcript of Record, Item 1) R. 4.

2. Answer of United States (Appellant's Praecipe for Transcript of Record, Item 2). R. 14.

3. Answer of Interstate Commerce Commission (Appellant's Praecipe for Transcript of Record, Item 3). R. 16.

4. Answer of Southern Railway Company (Appellant's Praeipe for Transcript of Record, Item 4). R. 24.

5. Transcript of hearing on merits on June 4, 1948 and of the exhibits therein received, the following (Appellant's Praeipe for Transcript of Record, Item 5) R. 25:

A. Henderson v. United States, Civil Action 2455:

(1) Complaint (Stipulation as to Record, Item 2a). R. 145.

(2) Answer of Interstate Commerce Commission (Stipulation as to Record, Item 2b). R. 160.

(3) Amendment to Answer of Interstate Commerce Commission (Stipulation as to Record, Item 2c). R. 167.

(4) Answer of Southern Railway Company (Stipulation as to Record, Item 2d). R. 168.

(5) Opinion of the Court (Stipulation as to Record, Item 2f). R. 124.

(6) Decree dated February 13, 1946 (Stipulation as to Record, Item 2g). R. 170.

B. Henderson v. Southern Railway Company, Interstate Commerce Commission Docket No. 28895:

(1) Complaint (Stipulation as to Record, Item 2e).

(2) Answer of Southern Railway Company (Stipulation as to Record, Item 2e).

(3) Transcript of hearing before Interstate Commerce Commission on February 24, 1943, pp. 1-154 (Stipulation as to Record, Item 2e).

(4) Report and Order of Interstate Commerce Commission entered May 13, 1944 (Stipulation as to Record, Item 2e).

[fol. 416] (5) Order of Interstate Commerce Commission entered September 18, 1944 (Stipulation as to Record, Item 2e).

(6) Transcript of hearing before Interstate Commerce Commission on October 15, 1946 and exhibits 3 to 9 inc. (Stipulation as to Record, Item 3). pp. 195-238.



6. Opinion of the Court, September 25, 1948 (Appellant's Praeipe for Transcript of Record, Item 6). R. 90.
7. Final decree entered October 28, 1948 (Appellant's Praeipe for Transcript of Record, Item 7). R. 110.
8. Petition for Appeal (Appellant's Praeipe for Transcript of Record, Item 8). R. 111.
9. Assignment of Errors (Appellant's Praeipe for Transcript of Record, Item 9). R. 113.
10. Order allowing Appeal (Appellant's Praeipe for Transcript of Record, Item 10). R. 112.
11. Citation on appeal (Appellant's Praeipe for Transcript of Record, Item 11). R. 117.
12. Statement directing attention to paragraph 3 of Rule 12 and proof of service (Appellant's Praeipe for Transcript of Record, Item 12). R. 118.
13. Order of December 13, 1948 extending time for docketing appeal, etc. (Appellant's Supplemental Praeipe for Transcript of Record, Item 1). R. 172.
14. Order of January 22, 1949 extending time for docketing appeal, etc. (Appellant's Supplemental Praeipe for Transcript of Record, Item 3). R. 177.
15. Order of January 22, 1949 as to Original Papers and Documents (Appellant's Supplemental Praeipe for Transcript of Record, Item 4). R. 175.
16. Appellant's Praeipe for Transcript of Record (Appellant's Praeipe for Transcript of Record, Item 13). R. 178.
17. Stipulation as to Record (Appellant's Supplemental Praeipe for Transcript of Record, Item 2). R. 143.
18. Appellant's Supplemental Praeipe (Appellant's Supplemental Praeipe for Transcript of Record, Item 5). R. 180.

Dated March 2, 1949.

Lawson, McKenzie & Windsor, 2001 11th St., N. W.,  
Washington 1, D. C., Attorneys for Appellant, by  
B. V. Lawson, Jr.

[fol. 417]

## Certificate of Service

It is hereby certified that a copy of the above Statement of Points to be Relied on and Designation of Parts of Record to be Printed was this day served upon counsel for appellees by mailing the same to them addressed as follows:

Allen H. Crenshaw, Esq., Interstate Commerce Commission, Washington 25, D. C.

Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

Charles Clark, Esq., A. J. Dixon, Esq., Attorneys for Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

March 2, 1949.

B. V. Lawson, Jr., Attorney for Appellant.

[fol. 418] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 14, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 53,572. U. S. D. C., Maryland. Term No. 570. Elmer W. Henderson, Appellant, vs. The United States of America, Interstate Commerce Commission and Southern Railway Company. Filed February 17, 1949. Term No. 570 O. T. 1948.